M. J. Mechanical Services, Inc. *and* Sheet Metal Workers Local Union 46

M. J. Mechanical Services, Inc. and J.D.M. Services, Inc., d/b/a Career Temporaries and Technical Service Group, Joint Employers *and* Sheet Metal Workers Local Union 46. Cases 3–CA–18626, 3–CA–18750, 3–CA–18760–1, 3–CA–18774, and 3–CA–18760–2

October 24, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On July 27, 1995, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, the Respondent filed cross-exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs,[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent herewith.[3]

The issues in this case arise from the Respondent's response to the Union's attempt to organize its employees by placing union members on the job to engage in ''salting'' activities. Contrary to the judge, we find that the Union's activities were protected by Section 7 of the Act and that the Respondent violated the Act by, inter alia, interrogating, threatening, discharging, and refusing to hire union members.

1. *Background*. At all relevant times, the Respondent, a sheet metal contractor with offices in Rochester and Buffalo, New York, was engaged in the construction of a building in Rochester, within the jurisdiction of Local 46. In early 1994, the Respondent learned that Local 46 was interested in supplying its members for the job. The Respondent, however, was determined to remain a nonunion contractor.

The Respondent hired Richard Wagner, formerly a member of Local 46, as its job manager. In the spring of 1994,[4] Wagner hired the initial crew of sheet metal workers, among them Foreman Jim Johnson and Assistant Foreman Mark Werner, both former members of Local 46. Wagner also eventually hired Paul Colon and Steven Derleth, union members who had received the Union's permission to work for the Respondent, a nonunion contractor, under the Union's ''salting'' program.

According to Donald Miller, the Union's business agent, the purpose of the ''salting'' program is to organize the employees of a nonunion company and eventually to bring that company into a contractual relationship with the Union. Colon and Derleth each signed a ''salt agreement'' with the Union. Their ''salting'' activities included talking to the Respondent's nonunion employees, comparing union benefits to those offered by the Respondent, offering to answer employees' questions, describing the Union's apprenticeship program, and in general discussing the pros and cons of belonging to the Union. They also reported to the Union about the job, i.e., the number of employees, types of material used, and how the work was progressing. A few weeks after they began work, Miller granted Colon's and Derleth's requests that the Union ''subsidize'' their wages by $300 a week to make up the difference between the hourly rate the Respondent paid them and the rate they would have been paid had they worked for a union contractor.

2. *Colon and Derleth: Interrogations and threat*. During separate interviews with Wagner and Johnson, Colon and Derleth were asked how they felt about the Union and whether they were afraid of being caught by the Union for working at a nonunion contractor. Johnson also asked Colon if he was prepared to leave the Union and stay with the Respondent.

The judge declined to find the interrogations unlawful because he believed the inquiries were designed ''to protect [Colon and Derleth] from being fined or otherwise disciplined by the Union.'' We disagree.[5]

It is well settled that questioning a job applicant about his union preferences during a job interview is inherently coercive and unlawful even when the appli-

[1] On October 16, 1995, Associated Builders & Contractors, Inc. filed a motion for leave to file a brief as amicus curiae. Its amicus brief was attached to its motion. The Board's Executive Secretary's office accepted the brief along with the motion. Subsequently, the General Counsel opposed the motion claiming the brief was untimely filed. Because the Executive Secretary's office has already accepted the amicus brief, we find the General Counsel's opposition moot.

[2] The General Counsel, the Charging Party, and the Respondent have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. Thus, we shall not disturb the judge's finding that the Respondent did not refuse to hire Don Litolff. We do, however, disavow his speculation about why Litolff declined employment. Further, we shall not disturb the judge's finding that the Respondent issued a warning to employee Diak for a serious safety violation. In adopting the finding, we also note that the general contractor had one of its employees on site to make sure that employees wore their safety equipment on the job.

[3] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[4] All subsequent dates are in 1994 unless indicated otherwise.

[5] As set forth in his separate opinion, Member Higgins dissents on this issue.

cant is hired.[6] Furthermore, we do not believe that questioning an applicant about his attitude toward a union and whether he is prepared to leave a union is simply a reminder that the applicant could be fined or disciplined because he was employed by a nonunion employer. As the judge recognized in his discussion of the Respondent's interview of another applicant, facing union discipline ''would have been [the applicant's] problem and not something that the company needed to be concerned about.''

In sum, we reject the judge's reasoning as illogical and unsupported by the record, and we find that the Respondent coercively interrogated Colon and Derleth about their union sympathies in violation of Section 8(a)(1).[7]

Shortly after starting work, Colon and Derleth told Werner they were on the job to organize the Respondent's employees. As soon as Johnson got this information, he questioned Derleth about his union affiliation. When Derleth responded that he was being subsidized by the Union and was on the job to organize, Johnson stated that if he heard Derleth ''or anyone else talking about the [U]nion on company time,'' they would be off the job.

The judge neglected to make any findings about this alleged threat. As the judge recognized elsewhere in his decision, a rule prohibiting union solicitation on ''company time'' is overbroad and presumptively invalid because it is subject to the reasonable construction that solicitation at any time, including break times or other nonwork periods, is prohibited. See, e.g., *Gemco*, 271 NLRB 1190 (1984). Accordingly, we find that Johnson's statement to Derleth was unlawful because it constituted a threat to discharge employees for violating an invalid no-solicitation rule.

3. *Colon and Derleth: ''Salting'' activities and their discharges*. It is undisputed that on June 3, Colon and Derleth announced that they were union organizers and that the Respondent fired them.

The judge found that Colon and Derleth's ''salting'' activities were not protected, but that their discharges violated Section 8(a)(3) because the Respondent ''believed that Colon and Derleth were going to try to organize the employees.'' We find that their activities were protected by Section 7 and that they were unlawfully discharged in retaliation for engaging in such activities.

As the judge recognized, the fact that Colon and Derleth were ''salts'' does not deprive them of their status as statutory employees. In *NLRB v. Town & Country Electric*,[8] the Supreme Court approved the Board's long-held view[9] that individuals sent to obtain jobs from an employer pursuant to a union's ''salting'' program are statutory employees entitled to protection under the Act.[10]

At the time of their discharges, Colon and Derleth were engaging in the ''salting'' activities described in section 1, above. The judge found that the Union's ''salting'' program was not designed to organize the Respondent, but was, instead, designed to ''entrap'' the Respondent into committing unfair labor practices, interfere with its business, lure its employees away to union signatory contractors, engage in acts of sabotage, and drive it out of the Rochester area. The judge described these activities as ''tortious interference with business relations.'' ''Salting'' is one method a union utilizes to organize employees.[11] We find nothing in the record to support the judge's conclusions about the ''salting'' in this case.[12] For example, the judge relied on the fact that an employee left the Respondent's employ to enter the Union's apprenticeship program as support for his finding that the Union sought to drive the Respondent out of business. The record shows, however, nothing more than employees discussing the benefits of unionizing, which, in the industry involved in this case, include apprenticeship programs. That an employee decided to take advantage of such a program can hardly be called ''luring'' employees away from the Respondent and in no way translates into attempting to put the Respondent out of business. Further, the judge found that the ''salting'' program was designed to entrap the Respondent into committing unfair labor practices. Like most of the judge's other observations about the Union's ''salting'' program, this finding was based on little more than pure speculation. Assuming arguendo that the judge's speculation has any basis, we have nonethless held that even if ''salting'' is intended

[6] *Electro-Tec, Inc*., 310 NLRB 131, 134 (1993).

[7] In reaching the opposite conclusion, Member Higgins asserts that Colon and Derleth ''were known adherents of the Union.'' As the Fifth Circuit has stated, however, the mere fact that an employee ''was a widely-known union adherent does not validate otherwise coercive interrogation.'' *NLRB v. Brookwood Furniture*, 701 F.2d 452, 463 fn. 35 (5th Cir. 1983). In this case, the interrogations were clearly ''otherwise coercive,'' because they took place in the context of employment interviews, and because the questions concerned matters related to the applicants' union affiliation which were not the Respondent's concern.

Chairman Gould further notes that he would reverse *Rossmore House*, 269 NLRB 1176 (1984), cited by our dissenting colleague, in which the Board found that an employer's questioning of open and active union adherents about their union sentiments, in the absence of threats or promises, does not necessarily violate the Act. See *Beverly Enterprises*, 322 NLRB 334 fn. 1 (1996) (Chairman Gould's dissent).

[8] 116 S.Ct. 450 (1995).

[9] See *Sunland Construction Co*., 309 NLRB 1224 (1992).

[10] See also *Bat-Jac Contracting*, 320 NLRB 891 fn. 3 (1996), and *Godsell Contracting*, 320 NLRB 871 fn. 4 (1996).

[11] See *Tualatin Electric*, 312 NLRB 129, 130 fn. 3 (1993).

[12] It is clear that the judge's personal opinion of union ''salting'' rather than a close review of the record informed his conclusions. We disavow as irrelevant both the judge's personal views about ''salting'' and the conclusions he reached based upon those views. See *Ipalli, Inc*., 321 NLRB 463 fn. 1 (1996), in which the Board similarly disavowed Judge Green's discussion of the goals of the union's ''salting'' program.

in part to provoke an employer to commit unfair labor practices, that would not deprive employees of protection of the Act.[13] *Godsell Contracting*, supra, 320 NLRB at 874. Finally, we find absolutely no evidence that the Union or employees engaged in or intended to engage in sabotage. In short, there is nothing in the record to support a finding that the ''salting'' in this case was a subterfuge used to further any purpose unrelated to organizing.

Nor do we accept the Respondent's claim that the Union was not engaged in organizing activities because Colon and Derleth did not pass out union authorization cards. Colon's and Derleth's discussions with the Respondent's employees constitute traditional, lawful organizing activity and are clearly protected by the Act.[14] See *Tualatin Electric*, supra, 312 NLRB at 131, 135. Thus, contrary to the judge, we find that the activities in which Colon and Derleth engaged, and for which the Respondent fired them, constituted protected organizational activity.

The Respondent does not dispute that Colon and Derleth were fired because they engaged in the activities discussed above. Rather, the Respondent claims that because they were not engaged in protected activity, their terminations did not violate the Act.

We have found that the activities in which Colon and Derleth engaged were protected under Section 7. Thus, the General Counsel has proved that they engaged in union organizational activity and were discharged when they announced that they were union organizers. Further, because we have rejected the Respondent's asserted reason for claiming that the discharges did not violate the Act, it follows that the Respondent has not shown that it would have terminated Colon and Derleth in the absence of their protected union activities.[15]

Accordingly, we conclude that the Respondent discharged Colon and Derleth because of their protected activities in violation of Section 8(a)(3).

4. *Colon and Derleth: Postdischarge incidents*. On June 6, Colon, Derleth, and Union Business Agent Miller met with Luis DelaFuente, the Respondent's sheet metal department manager, to discuss the employees' discharges. DelaFuente indicated that the Respondent had erred in firing Colon and Derleth and offered to reinstate them. DelaFuente advised Colon and Derleth, however, that although they could engage in union activities on their own time, they could not do so during their breaks or on company time.[16]

On their return to work on June 13,[17] Colon and Derleth resumed their prounion discussions with employees. They carried on these conversations while they worked. Werner reported their activities to Johnson, who issued them written disciplinary warnings for soliciting employees on company time. Colon and Derleth immediately left the job and began picketing at the jobsite with signs asserting that they were engaged in an unfair labor practice strike. On June 28, Colon asked to return to work. The Respondent refused to reinstate him.

The judge dismissed the allegations that the warnings to Colon and Derleth violated the Act and that they engaged in an unfair labor practice strike to protest the warnings, because he believed their discussions with employees were a tortious interference with the Respondent's business. The judge also found that Colon and Derleth left their work areas to engage in discussions with other employees. Finally, because he found that their strike was economic in nature, the judge treated Colon as an economic rather than an unfair labor practice striker. We find that the warnings[18] violated the Act, that Colon and Derleth engaged in an unfair labor practice strike to protest the warnings, and that Colon is entitled to reinstatement.

The judge erred in finding that Colon and Derleth ceased work to engage in discussions with other employees. The record shows that in the performance of their jobs, employees made frequent trips between the area in which they were working and the gang box, where their tools are kept. Colon's and Derleth's conversations with other employees occurred while they worked, which included making trips to the gang box. Thus, Colon and Derleth were constantly in a work area while they were talking to others and there is no evidence that they stopped work at any time to talk.

We find that Colon and Derleth were disciplined for talking about the Union while working. It is undisputed, however, that employees were permitted to talk about a variety of nonwork subjects—cars, family, sports, etc.—while they worked, without being disciplined for doing so. The Respondent may not prohibit discussions about a union during worktime while permitting discussions about other nonwork subjects.[19] We find, therefore, that the written disciplinary warn-

[13] As set forth in his separate opinion, Member Higgins does not pass on the issue of whether activities designed in part to provoke an unfair labor practice are protected by Sec. 7 of the Act.

[14] Nor does the fact that the Union did not file a representation petition or demand bargaining have any bearing on whether the employees' activity was protected.

[15] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *Tualatin Electric*, supra, 312 NLRB at 134–135.

[16] We agree with the judge that the rule announced by DelaFuente was overly broad and, therefore, unlawful because it prohibited employees from engaging in union solicitation during their breaktimes.

[17] The record does not explain why Colon and Derleth did not return to work until June 13. We disavow the judge's speculation about the timing of their return.

[18] As set forth in his separate opinion, Member Higgins does not pass on the issue of whether the strike by Colon and Derleth was an unfair labor practice strike.

[19] *Williamette Industries*, 306 NLRB 1010 fn. 2, 1017 (1992).

ings issued to Colon and Derleth for engaging in union activities violated Section 8(a)(3) of the Act.

For the reasons explained in section 3, above, we reject the judge's finding that Colon and Derleth were engaged in tortious acts when discussing the Union with other employees. Instead, we find that their activity was protected by Section 7 of the Act. We emphasize that we can find nothing in the record to support a finding that Colon's and Derleth's ''salting'' activity was anything other than designed to inform employees about the benefits of unionization.

Thus, when Colon and Derleth left the job to protest their unlawful warnings, they were engaged in an unfair labor practice strike which was, contrary to the judge's findings, protected by the Act.[20] As an unfair labor practice striker, Colon was entitled to be reinstated on his unconditional offer to return to work.[21] When the Respondent refused to reinstate him on his offer to return to work on June 28, the Respondent violated Section 8(a)(3) of the Act.[22]

5. *Group applicants*. On June 13, eight union members applied for work with the Respondent. All submitted a form supplied by the Union which stated that the applicant was a ''voluntary Union Organizer who would, if hired, perform all duties to the best of [his] ability,'' and who would ''also attempt, during non-work time and in non-work areas, to organize [the Respondent's] employees into a Union.''

The Respondent's president, Michael Poole, asked his secretary to get in touch with the applicants to set up interviews at the Respondent's headquarters in Buffalo with Poole. Only Mark Roberge and Dean Weiss responded.[23] Roberge and Weiss drove from Rochester to Buffalo, about 75 miles, for an interview with Poole, who ordinarily did not participate in personnel interviews, but who decided to do so with Roberge and Weiss because of the ''Union situation.''

Poole asked both Roberge and Weiss, who he knew to be union members and whom he knew would be on the job to organize the Respondent's employees, whether they would leave the Respondent if the Union did not succeed in organizing the Respondent's employees after a period of time. Although Poole told them the Respondent would contact them, neither Roberge nor Weiss was contacted again.

The judge dismissed allegations that the Respondent violated the Act by requiring Roberge and Weiss to go to Buffalo for their interviews, interrogating them, and failing to hire them. We do not agree.

Requiring Roberge and Weiss to go to Buffalo for a job interview was a departure from the Respondent's normal hiring practice. The Respondent had interviewed all other applicants for jobs at the Rochester site in Rochester. Further, Poole admitted that had the applicants not been Local 46 members, he would not have conducted the interview. Poole explained that he decided to interview these applicants in Buffalo because of problems the Respondent was having with Local 46 in Rochester.[24]

Poole's testimony is an admission that Roberge's and Weiss' union membership motivated Poole's decision to require them to come to Buffalo for interviews. The imposition of a significant travel requirement for applicants to obtain an interview, if directed only at union-associated applicants, is discriminatory and therefore violates Section 8(a)(3).[25]

In addition, we find that Poole's questioning of Roberge and Weiss about their attitude toward the Union constituted coercive interrogations in violation of Section 8(a)(1).[26] The interrogations occurred at the Respondent's headquarters during job interviews conducted by the Respondent's president. We have found that the Respondent openly demonstrated its hostility to the Union on numerous occasions and violated the Act when it asked Colon the same question during his job interview and when it disparately imposed a travel requirement on Roberge and Weiss. Notwithstanding that Roberge and Weiss openly demonstrated their support for the Union, we find that, considering all the circumstances—i.e., the questioning was by the Respondent's president, and the Respondent had dem-

[20] Because Chairman Gould and Member Fox have reversed the judge's finding that the strike engaged in by Colon and Derleth was not an unfair labor practice strike, they find it unnecessary to pass on the remainder of the judge's discussion in sec. II,h of his decision concerning the issue of whether their strike was otherwise protected.

[21] *Caterair International*, 309 NLRB 869, 880 (1992). See also *Decker Coal Co*., 301 NLRB 729, 746–748 (1991).

[22] *Caterair International*, supra, fn. 17 and *Decker Coal Co*., supra, fn. 17. Derleth eventually abandoned the strike and obtained other employment. The General Counsel did not allege that the Respondent unlawfully refused to reinstate him.

[23] As set forth in her dissent in part, Member Fox would find that the Respondent violated Sec. 8(a)(3) by refusing to hire the six applicants who did not report to Buffalo for interviews.

Chairman Gould and Member Higgins believe that the evidence their dissenting colleague relies on is too speculative to support a finding that the six additional applicants received a message from the Respondent to travel to Buffalo for an interview. Consequently, they conclude that the General Counsel has not proven an element necessary to find the additional violations.

In his separate opinion, Member Higgins adds to the majority's rationale for not finding violations regarding the six alleged discriminatees.

[24] Poole stated ''it seemed to [him] that there was something going on, because all these applications have a statement at the bottom,'' referring to the ''I am a voluntary Union Organizer'' statement on each job application.

[25] See *Casey Electric*, 313 NLRB 774, 775 (1994), in which the employer disparately treated job applicants with a union background by changing its previous hiring practices.

[26] We find it significant that during the interview, immediately before Poole's interrogation of Roberge, another of the Respondent's agents referred to his experiences with the Union and said that, ''you have to watch out for these union halls, they'll stab you in the back every chance they get.''

onstrated antiunion hostility including the unlawful travel requirement imposed on Colon and Derleth—Poole's interrogation of them was coercive.[27]

Furthermore, we find that the Respondent violated Section 8(a)(3) when it failed to hire Roberge and Weiss.[28] The elements of a disciminatory refusal-to-hire case include

> the employment application by each alleged discriminatee, the refusal to hire each, a showing that each was or might be expected to be a union supporter or sympathizer, and further showings that the employer knew or suspected such sympathy or support, maintained an animus against it, and refused to hire the applicant because of such animus.[29]

Obviously, the Respondent knew that Roberge and Weiss were union members. Furthermore, the Respondent does not claim that either applicant was unqualified for the jobs for which they applied.[30] The record is replete with evidence of the Respondent's hostility to the Union and discriminatory treatment of its members. Finally, we note that the Respondent hired at least seven sheet metal workers after its June 17 interviews with Roberge and Weiss.[31] In sum, we find that this evidence establishes a strong prima facie case that the Respondent refused to hire Roberge and Weiss because of their union membership.

The Respondent claims that neither applicant was an impressive job candidate based on their conduct and their responses to questions posed during their job interviews and, alternatively, that the applicants were not really seeking employment. We find neither claim convincing.

Poole testified that he did not think Roberge and Weiss were serious about being ''long-term'' or ''loyal'' employees and that he thought the Union was up to ''some kind of trick'' in sending applicants to go through the interview process. Yet, the Respondent failed to produce any evidence indicating that the applicants were not seriously interested in employment.[32]

Further, the Respondent's testimony undermines the alternative claim that the Respondent did not hire Roberge and Weiss because of the impressions the applicants made during their interviews. It is clear from Poole's suspicion of the Union and his concern about ''loyal employees'' that their union membership, rather than the impression they made during their interviews, was the Respondent's reason for failing to hire them.

Thus, the Respondent failed to show that it would not have hired Roberge and Weiss absent their union membership.[33] Accordingly, we find that the Respondent violated Section 8(a)(3) by refusing to hire them.

6. *Christopher Diak*. Christopher Diak applied for a job with the Respondent at the urging of Colon and Miller and agreed to abide by the Union's ''salting'' resolution. He did not list his union background on his job application, fearing he would not be hired if he did so.[34] Johnson and DelaFuente, who both interviewed Diak, asked him if he had anything to do with the Union. Johnson referred to prior problems with the Union and stated that Local 46 had driven his brother out of business. Diak denied that he was a union member. The Respondent hired Diak to begin work on August 1.

By August 4, on learning that Diak was a ''salt'' and that he had falsified his application form, the Respondent decided to discharge him. On August 5, Diak told Johnson that he was an organizer for Local 46 and asked if Johnson had any problem with that. Johnson responded that he did not. Later that day, however, a representative of the employment agency through which Diak had been hired told him that his job was over but gave no reason for the discharge.

The judge found that the Respondent's interrogation of Diak was not unlawful, because the Respondent had a legitimate business reason for interrogating him about the Union's ''salting'' program, which the judge found was unprotected. We have found elsewhere in this decision that the ''salting'' activity was protected conduct. Thus, we do not agree with the judge that concern about the ''salting'' activity was a legitimate reason for interrogating Diak.[35]

Questioning a job applicant about his union affiliation is coercive interrogation prohibited by the Act.[36] We find that the Respondent's interrogation of Diak violated Section 8(a)(1).

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[27] See *Reno Hilton*, 319 NLRB 1154, 1167 (1995), *Grimmway Farms*, 314 NLRB 73, 93 (1994), and *Electro-Tec*, supra.

[28] Chairman Gould and Member Higgins agree with the judge that the Respondent did not violate the Act by failing to hire the other applicants.

We disavow the judge's comments that the group applications were designed to provoke an unfair labor practice and that the applicants were never interested in working for the Respondent. There is no evidence to support the judge's speculation.

[29] *Big E's Foodland*, 242 NLRB 963, 968 (1979).

[30] DelaFuente conceded that experience with Local 46 ''means a lot to [him] . . . a lot to our company.''

[31] No union member was knowingly hired, thus demonstrating the success of the Respondent's screening process.

[32] In fact, the record shows otherwise. Roberge and Weiss testified that they needed the work and would have accepted a job had the Respondent offered one, and Roberge testified that the Rochester job was an impressive project and offered long-time employment.

As explained elsewhere in our decision, we reject any argument that Roberge and Weiss were not serious because they committed themselves to the Union's ''salting'' program. See also *Casey Electric*, supra, 313 NLRB at 786 (1994).

[33] *Wright Line*, supra.

[34] Even the judge admitted it was unlikely that Diak would have been hired if he admitted he was a union member.

[35] We do not pass on the judge's suggestion that interrogation of an applicant about his union affiliation because of concern about unprotected union activity would be lawful.

[36] *Electro-Tec*, supra, 310 NLRB at 134.

The judge also relied on his finding that the ''salting'' activity engaged in by union members was unprotected to dismiss the allegation that Diak's discharge violated Section 8(a)(3).

The judge found that ''a reason'' the Respondent discharged Diak was because it believed he would engage in ''salting'' activity. We have found the ''salting'' activity employees engaged in is protected conduct. Thus, the General Counsel presented a strong case that union animus was a motivating factor in the discharge.

Accordingly, under *Wright Line*, the burden shifts to the Respondent to show that it would have discharged Diak even absent his protected activity. We find that the Respondent failed to satisfy its burden.

For the first time, in its posthearing brief, the Respondent defended the discharge on the ground that Diak's falsification of his job application violated a personnel rule calling for an employee's discharge for ''falsification of time or any other company records.'' At the time of the discharge, however, the Respondent did not tell Diak this or give him any other reason why he was discharged.[37] Furthermore, at the evidentiary hearing in this proceeding, the Respondent failed to draw any connection between Diak's discharge and its rule.[38] The Respondent's tardy reliance on Diak's alleged violation of its personnel rule strongly suggests that the Respondent was searching for a convenient pretext to justify the discharge.

The Board has held that:

> Under *Wright Line* an employer cannot carry its burden of persuasion by merely showing that it had a legitimate reason for imposing discipline against an employee, but must show by a preponderance of the evidence that the action would have taken place even without the protected conduct. . . . If an employer fails to satisfy its burden of persuasion, the General Counsel's prima facie case stands unrebutted and a violation of the Act may be found.[39]

We find that the Respondent has failed to carry its burden by persuading, by a preponderance of the evidence, that it would have discharged Diak absent its belief that he would engage in protected conduct. Accordingly, we find that the Respondent violated Section 8(a)(3) by discharging Diak.[40]

[37] See *NLRB v. Griggs Equipment, Inc*., 307 F.2d 275, 278 (5th Cir. 1962) (An employer's failure to give the employee a reason for his discharge ''alone would be enough to support an inference that the [termination] was discriminatory.'')

[38] The personnel policy manual containing the rule allegedly relied on by the Respondent was introduced as evidence at the hearing for reasons unrelated to Diak's discharge.

[39] *Hicks Oil & Hicksgas*, 293 NLRB 84, 85 (1989).

[40] We find no support in the record for the judge's gratuitous comments about Diak's capabilities, or the lack thereof, as a sheet metal worker.

CONCLUSIONS OF LAW

1. By coercively interrogating job applicants or employees concerning their union membership, activities, and sympathies, the Respondent violated Section 8(a)(1) of the Act.

2. By threatening employees with discharge if they engage in union activities, the Respondent violated Section 8(a)(1) of the Act.

3. By promulgating an overly broad no-solicitation rule prohibiting employees from engaging in union solicitation during their breaktimes, the Respondent violated Section 8(a)(1) of the Act.

4. By issuing written disciplinary warnings to Paul Colon and Stephen Derleth for engaging in union activities, the Respondent violated Section 8(a)(3) and (1) of the Act.

5. By requiring job applicants to appear for interviews at its Buffalo, New York office rather than at its Rochester, New York office because they are union members, the Respondent violated Section 8(a)(3) and (1) of the Act.

6. By refusing to hire Dean Weiss and Mark Roberge because of their union membership, the Respondent violated Section 8(a)(3) and (1) of the Act.

7. By discharging Paul Colon, Stephen Derleth, and Christopher Diak because they engaged in union activities, the Respondent violated Section 8(a)(3) and (1) of the Act.

8. By refusing to reinstate Paul Colon on his unconditional offer to return to work after engaging in an unfair labor practice strike, the Respondent violated Section 8(a)(3) and (1) of the Act.

THE REMEDY

Having found that the Respondent violated Section 8(a)(1) and (3) of the Act, we shall order it to cease and desist, and to take certain affirmative action necessary to effectuate the policies of the Act.

Having found that the Respondent unlawfully promulgated an overly broad no-solicitation rule, we shall order the Respondent to rescind and cease giving effect to this rule. Having found that the Respondent unlawfully issued written disciplinary warnings to Colon and Derleth, we shall order the Respondent to remove from their personnel files all warnings and reports that have been given to them pursuant to this rule, and to inform them, in writing, that such references have been removed and that these warnings and reports will not be used as a basis for further personnel actions against them in the future.

Having found that the Respondent unlawfully refused to hire Dean Weiss and Mark Roberge because of their union membership, we shall order that the Respondent offer Weiss and Roberge immediate and full employment in positions for which they applied or, if such positions no longer exist, to substantially equiva-

lent positions, without prejudice to their seniority or other rights and privileges. We shall further order the Respondent to make Roberge and Weiss whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with backpay extending from June 17, 1994, the date of the unlawful refusal to hire them, until the Respondent offers them employment. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found that the Respondent unlawfully discharged Christopher Diak because of his union activities, we shall order the Respondent to offer Diak immediate and full reinstatment to his former job or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings and other benefits suffered as a result of the Respondent's discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co*., supra, with interest as prescribed in *New Horizons for the Retarded*, supra.

Having found that the Respondent unlawfully discharged Paul Colon and Stephen Derleth because of their union activities, we shall order the Respondent to make them whole for any loss of earnings and other benefits they may have suffered from the date of their discharges on June 3, 1994, to the date on which they returned to work, June 13, 1994. The Respondent claims that its June 6, 1994 offer of reinstatement was a valid offer which tolled its backpay obligation. We agree with the judge that the Respondent's offer was not valid because it was conditioned on the discriminatees' agreement to abide by an unlawful no-solicitation rule. To be valid and to toll the backpay period, an offer of reinstatment must be ''specific, unequivocal and unconditional.'' *Jones Plumbing Co*., 277 NLRB 437, 449 (1985).

Having found that the Respondent unlawfully refused to reinstate unfair labor practice striker Colon on his unconditional offer to return to work on June 28, 1994,[41] we shall order the Respondent to offer him immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, discharging, if necessary, any replacement, together with backpay from June 28, 1994, the date of his request to return to work. Backpay shall be computed in accordance with *F. W. Woolworth Co*., supra, with interest as prescribed in *New Horizons for the Retarded*, supra.

The Respondent shall also be ordered to expunge from its files any and all references to the unlawful employment actions, and to notify the discriminatees, in writing, that this has been done.

[41] *Reichhold Chemicals*, 301 NLRB 1228, 1233 (1991). As previously noted, Derleth did not return to the Respondent because he found other employment.

ORDER

The National Labor Relations Board orders that the Respondent, M. J. Mechanical Services, Inc., Tonawanda and Buffalo, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating job applicants or employees concerning their union membership, activities, and sympathies.

(b) Threatening employees with discharge if they engage in union activities.

(c) Promulgating or enforcing any rule which prohibits employees from engaging in union solicitation during their breaktimes.

(d) Requiring job applicants to appear for job interviews at the Respondent's Buffalo, New York facility rather than its Rochester, New York facility, because they are union members.

(e) Issuing written disciplinary warnings to employees for engaging in union activities.

(f) Refusing to hire, discharging, or otherwise discriminating against employees because of their union activities.

(g) Refusing to reinstate employees on their unconditional offer to return to work after engaging in an unfair labor practice strike.

(h) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind its unlawful no-solicitation rule.

(b) Within 14 days from the date of this Order, offer Paul Colon and Christopher Diak full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, in the manner described in the remedy section of this decision.

(c) Within 14 days from the date of this Order, offer Dean Weiss and Mark Roberge full employment in positions for which they applied or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges.

(d) Make Paul Colon, Stephen Derleth, Christopher Diak, Dean Weiss, and Mark Roberge whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner described in the remedy section of this decision.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful employment actions against Paul Colon, Stephen Derleth,

Christopher Diak, Dean Weiss, and Mark Roberge, and within 3 days thereafter notify them in writing that this has been done and that these actions will not be used against them in any way.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful disciplinary warnings given to Paul Colon and Stephen Derleth, and within 3 days thereafter notify them in writing that this has been done and that the warnings will not be used against them in any way.

(g) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its Tonawanda and Rochester, New York facilities, copies of the attached notice marked ''Appendix B.''[42] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 6, 1994.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER FOX, dissenting in part.

I agree with my colleagues in all respects, except that I would also find that the Respondent violated Section 8(a)(3) by refusing to hire Todd Babicz, Robert Copie, Mark Golding, William Roeger, Douglas Stein, and John Suhr. Those six individuals appeared with Roberge and Weiss on June 13 and applied for employment with the Respondent. Unlike Roberge and Weiss, however, they did not report to Buffalo for interviews and were never hired.

The judge, having found that the Respondent did not violate the Act by requiring the union applicants to travel to Buffalo for job interviews, further found that the six applicants who failed to comply with the travel requirement had abandoned interest in working with the Respondent. My colleagues and I have found, however, that the Respondent violated Section 8(a)(3) and (1) by imposing the travel requirement. Given this finding, I would further find that the Respondent violated Section 8(a)(3) and (1) by refusing to hire these six applicants because of their failure to comply with the travel requirement.

As we have found, the Respondent was not entitled to require those applicants to travel to Buffalo for interviews in the first place, because it is unlawful to require union adherents to comply with a significant travel requirement that is not imposed on nonunion applicants. And because it is unlawful to impose such a requirement, it is also unlawful to deny employment to applicants because they fail to comply with it.[1] Thus, when the Respondent argues that Babicz, Copies, Golding, Roeger, Stein, and Suhr were not serious applicants for employment because they did not go to Buffalo for interviews, it is attempting to justify its refusal to hire them for available jobs on the basis of their failure to comply with an unlawful employment requirement. That is not a defense; it is an admission of an unfair labor practice. Taken together with the Respondent's amply demonstrated union animus, knowledge that the six applicants were union activists, and failure to show that those applicants were not qualified for the available jobs,[2] it establishes that union animus was a motivating factor in the denials of employment. As the Respondent has not attempted to demonstrate that it would have refused to hire those applicants even if they had not been union members, I would find that its refusal to hire them violated Section 8(a)(3).

MEMBER HIGGINS, concurring in part and dissenting in part.

I concur with most of the results reached by my colleagues. However, as to certain matters, I do not fully adopt their rationale. I also wish to add to the majority's rationale for not finding violations regarding six alleged discriminatees. As to another matter, I dissent from the result.

With respect to the concurrence, I agree that the salting activities engaged in by Colon and Derleth

[42] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

[1] Michael Poole's secretary testified that over a 3- to 4-day period, she kept calling the applicants to see if she could reach them. She left messages on answering machines and with family members for the applicants to report to Buffalo on June 17 for an interview. There is no evidence that any applicant failed to receive the message.

[2] As with Weiss and Roberge, the Respondent only characterizes the information on their applications as ''minimal conclusory assertions about 'experience.''' It does not contend that it asked for additional information or that the applicants refused to provide it.

were protected. However, I do not pass on the issue of whether activities designed in part to provoke an unfair labor practice are protected by Section 7 of the Act. In this regard, I note that the evidence does not establish that there was such a design in this case. Also, although I agree that the Respondent violated Section 8(a)(3) by refusing to reinstate Colon, I do not pass on the issue of whether the strike by Colon and Derleth was an unfair labor practice strike. In this regard, I note that the allegation concerning a denial of reinstatement pertains only to Colon. There is no evidence or claim that Colon was permanently replaced. Thus, even as an economic striker, he was entitled to reinstatement on request.

In addition, I agree that the Respondent unlawfully imposed on Roberge and Weiss a requirement that they go to Buffalo to be interviewed for jobs. However, as to the six other alleged discriminatees (Babicz, Copies, Golding, Roeger, Stein, and Suhr), the General Counsel has not shown that they even learned of this requirement. Thus, without reference to this requirement, they ''abandoned whatever interest they might have had in working for [Respondent]'' (ALJD 14).

As to Colon and Derleth, I do not agree that the questions directed to them were coercive. Board law is clear that a question is not coercive simply because it delves into a Section 7 area. The Board looks at the particular circumstances of each case. *Rossmore House*, 269 NLRB 1176 (1984). Further, as *Rossmore House* makes clear, one such circumstance is whether the employees are known adherents of the union. In the instant case, Colon and Derleth were known adherents of the Union. In addition, based on the questions directed to them, there is nothing to suggest that they reasonably would be coerced. The questions, as reasonably perceived, were aimed at ascertaining how Colon and Derleth, as union members, would protect themselves from union discipline, *not* whether they were, in fact, union members.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively interrogate job applicants or employees about their union membership, activities, and sympathies.

WE WILL NOT threaten employees with discharge for engaging in union activities.

WE WILL NOT promulgate or enforce any rule which prohibits employees from engaging in union solicitation during their breaktimes.

WE WILL NOT issue written disciplinary warnings to employees for engaging in union activities.

WE WILL NOT require job applicants to appear for job interviews at our Buffalo, New York facility rather than our Rochester facility because they are union members.

WE WILL NOT refuse to hire, discharge, or otherwise discriminate against any of you for engaging in protected concerted activities.

WE WILL NOT refuse to reinstate any employees who make an unconditional offer to return to work after participating in an unfair labor practice strike.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind our unlawful no-solicitation rule which prohibits employees from engaging in union solicitation during their breaktimes.

WE WILL, within 14 days from the date of the Board's Order, remove from the personnel records of Paul Colon and Stephen Derleth the written warnings they received for engaging in union activities and WE WILL, within 3 days thereafter, notify them that this has been done and that the warnings will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's Order, offer Paul Colon and Christopher Diak full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, offer Dean Weiss and Mark Roberge full employment in positions for which they applied or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges.

WE WILL make Paul Colon, Stephen Derleth, Christopher Diak, Dean Weiss, and Mark Roberge whole for any loss of earnings and other benefits resulting from the discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to

the unlawful employment actions against Paul Colon, Stephen Derleth, Christopher Diak, Dean Weiss, and Mark Roberge, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that these actions will not be used against them in any way.

M. J. MECHANICAL SERVICES, INC.

Michael Israel, Esq., for the General Counsel.
Thomas S. Gill, Esq., for the Respondent.
Donald Miller, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in Rochester, New York, from March 6 through 10, and on April 17, 1995. The charge in Case 3–CA–18626 was filed on June 6, 1994. The charge and amended charge in Case 3–CA–18750 were filed on August 2 and September 19, 1994. The charge and amended charge in Case 3–CA–18760–1 were filed on August 8 and September 19, 1994. The charge and amended charge in Case 3–CA–18760–2 were filed on August 8 and September 19, 1994. The charge and amended charge in Case 3–CA–18774 were filed on August 15 and September 19, 1994.

An amended consolidated complaint was issued on November 10, 1994, and alleged:

1. That M. J. Mechanical Services (M. J.), a mechanical contractor in the building and construction industry, entered into a contract with J.D.M. to refer qualified employees to M. J. at its Rochester jobsite.

2. That J.D.M. Services, Inc. (J.D.M.) was an agent of M. J. and that both Companies, having administered a common labor policy, were joint employers vis-a-vis the employees at the Rochester jobsite who were referred by J.D.M.. As a practical matter the General Counsel only contended that J.D.M. was jointly and severally liable for the refusal by M. J. to hire Mark Golding.

3. That on or about May 3, 1994, J.D.M. by Christine DeHond told an unsuccessful job applicant (Golding), that M. J. had complained that he had refused to relinquish his membership in the Union as a condition of employment and would not assure that he would not quit M. J. for employment at other union jobs.

4. That on May 3, 1994, Respondent M. J. refused to offer employment to Mark Golding.

5. That on May 23, 1994, M. J. by its project superintendent, James Johnson, told a successful job applicant that he could not begin work unless he relinquished his membership in the Union.

6. That on May 23 and June 3, 1994, James Johnson threatened employees with discharge if they engaged in union organizing activities.

7. That M. J. engaged in interrogation on the following dates:

(a) Early April 1994 by Richard Wagner.
(b) Late April 1994 by James Johnson in a telephone conversation.
(c) Late April 1994 by James Johnson at the worksite.
(d) May 3, 1994, by James Johnson at the worksite.
(e) May 23, 1994, by James Johnson at the worksite.
(f) June 17, 1994, by Michael D. Poole at M. J.'s Buffalo, New York facility.
(g) July 19, 1994, by James Johnson at the worksite.
(h) July 22, 1994, by Luis DelaFuente at the worksite.

8. That on June 6, 1994, M. J. orally promulgated the following rule:

> Employees are prohibited from engaging in union organizing activities during their break periods.

9. That on June 13, 1994, M. J. refused to offer employment to Rodd Babicz, Robert Copie, Mark Golding, Dean Weiss, William Roeger, Douglas Stein, John Suhr, and Mark Roberge.

10. That on June 17, 1994, the Respondent issued disciplinary warnings to Colon and Derleth.

11. That on June 17, 1994, the Respondent required Roberge and Weiss to apply for jobs by going to its office in Tonawanda, New York.

12. That on June 28, 1994, Colon made an unconditional offer to return to work which was rejected by M. J.

13. That on August 1, 1994, M. J. by Mark Werner referred to a striking employee as a troublemaker.

14. That on August 3, 1994, M. J. by James Johnson in the presence of employees (a) threatened to cancel a work order because of union activity; and (b) told employees that M. J. would close its shop before signing a contract with the Union.

15. That on August 4, 1994, M. J. issued a written disciplinary warning to Chris Diak.

16. That on August 4, 1994, M. J. isolated Diak from the other employees on the Rochester jobsite.

17. That on August 5, 1994, M. J. discharged Diak for discriminatory reasons.

At the opening of the hearing, J.D.M.'s counsel expressed a desire to settle that portion of the case which related to it; namely, the allegations involving the refusal to hire Mark Golding. As a consequence of discussion between the parties and myself, J.D.M. offered a settlement that provided for one half of the backpay owed to Golding with the provision that J.D.M. would pay the remainder if a violation was found and if M. J. could not pay its portion of the backpay. As J.D.M. obviously was not in a position to reinstate Golding to a position at M. J., it agreed to give Golding a one time first preference to any job that became available and which he was qualified to do. It also agreed to refer him to future jobs on a nondiscriminatory basis. Finally, J.D.M. agreed to post a notice at its facility.

The terms of the settlement offer were opposed by the General Counsel but were not opposed by the Union or by Golding. As it seemed to me that the settlement proffered by J.D.M. would fully remedy any violation of the Act that could conceivably be found against J.D.M., I approved the settlement agreement on which J.D.M. tendered a check to Golding in the amount agreed on. Accordingly, I severed these cases and removed J.D.M. as a Respondent. Thus, provided that J.D.M. complies with the terms of the settlement agreement, it no longer should be considered a party to this proceeding.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the of parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

M. J. Mechanical Service, Inc. is a New York corporation engaged in the construction industry. It has a sheetmetal division which is involved in the present proceeding. It has its principle office and place of business in Tonawanda, New York, which is a suburb of Buffalo. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

In its answer, M. J. denied that the Union was a labor organization. Donald Miller, the Union's business manager, testified that Local 46 is an affiliate of the Sheet Metal Workers' International Association and that it has about 400 members who participate in its activities by attending meetings, voting for officers and ratifying collective-bargaining agreements. The Union maintains collective-bargaining agreements covering terms and conditions of employment on behalf of its members with various contractors in the Rochester area. Accordingly, I conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Company is a mechanical contractor engaged in the construction industry, mainly in the Buffalo, New York area. It has a sheetmetal department which is headed up by Louis DelaFuente. In November 1993, the Company was awarded the bid for sheetmetal work in relation to the construction of a building for Bausch & Lomb in Rochester, New York. According to DelaFuente, the Company's successful bid for this job was intended as the beginning of a plan to enter the Rochester market and bid for more work in this locality. (Within the jurisdiction of the Charging Party, Local 46.)

According to Michael Poole, the Company's president, he received a phone call in early 1994, from Pesce, an agent of the International Brotherhood of Sheet Metal Workers, who congratulated the Company on getting the Bausch & Lomb project and stated that he wanted to be part of it. Poole responded that he was not interested, whereupon Pesce asked how the Company intended to man the project. Poole said that the Company had some people in Rochester, that it could bring some people in from Buffalo and expected to get a couple of other people. Some time later, Pesce sent a copy of a contract with Local 71 of the Sheet Metal Workers to Poole. Poole also testified that he had a subsequent conversation with Pesce wherein Pesce said that Local 46 was the local union in the Rochester area and that he wanted Local 46 to be part of the Bausch & Lomb project from a manpower point of view. According to Poole, he had no contact with anyone from Local 46 and no further contacts from the International Union or any other local thereof regarding recognition.

DelaFuente hired Richard Wagner to be the manager of the Bausch & Lomb job. Wagner, who was a Rochester resident and who had been a member of Local 46, in turn hired the initial crew of sheetmetal workers. These workers, who were hired in the winter and spring of 1994, included Jim Johnson, Richard Amico, Paul Colon, Steven Derleth, Mark Werner, David Crowel, McDermot, and Charley Wilson. Some of these people, like Jim Johnson and Mark Werner, who were respectively the foreman and assistant foreman at the jobsite, had previously been members of Local 46. Others, such as Crowel, McDermot, and Wilson had never been members of the Union. Finally, some like Colon, Derleth, and Amico were ''salts'' in that they were given permission by Union President Donald Miller to work for the Company despite union rules prohibiting members from working for nonunion companies, so long as they carried out union instructions. At the time of their hire, Wagner and Johnson were aware that Colon, Derleth, and Amico were union members. What they did not know was that the Union was going to pay ''salts'' $300 per week to engage in salting activities once they were on the jobsite.

B. *The Salting Program*

The General Counsel asserts that the Union's salting program was designed to place union members into the employ of nonunion companies so that they could, while performing their work as employees, organize the other employees and eventually bring those companies into contractual relationships with the Union. The Respondent asserts that as applied by Local 46 to this particular employer (MJ), the salting program was not intended to organize M. J.'s employees, but rather to engage in various acts, including acts of sabotage, with the object of driving it out of the Rochester area and maintaining a cartel of unionized companies that would be the only ones allowed to bid for electrical work on construction sites within this locality. The Respondent asserts that the Union's plan included efforts to entrap the Company into committing violations of the National Labor Relations Act (NLRA) and other laws, and to also to induce the Company's nonunion employees to quit their employment and therefore to deny the Company access to a viable work force in the Rochester area.

Donald Miller testified that his Union adopted the salting program of the International Brotherhood of Electrical Workers and that he received training from their agents.[1] He testified that he was in possession of the IBEW's manual and used it as the basis of Local 46's salting program. The IBEW salting program was described to me in five previous cases, *Falcone Electric Corp*., 308 NLRB 1042 (1992); *Sullivan Electric Co*., JD–(NY)–94–95; *Consolidated Electrical Service*, JD–(NY)–11–95; *Belfance Electric*, JD–(NY)–555–95; and *Iplli, Inc*, JD–(NY)–60–95. Like the IBEW's program, Local 46 also passed a resolution, which requires its members who are placed as salts, to leave the employer on notification by the Union.[2] As previously indicated in *Sullivan Electric Co*., *Consolidated Electrical Service*, *Belfance Electric*, and *Iplli, Inc*., I stated that I thought the goals of the IBEW's salting program included the following objectives which could be separate or overlapping.

1. To put union members on a jobsite so as to enable the Union to organize the Company's employees in order to gain recognition either voluntarily or through a Board election.

[1] The IBEW's training program is called the COMET program.

[2] This type of resolution was the basis of the Eighth Circuit's opinion in *Town & Country Electric v. NLRB*, 34 F.3d 625 (8th Cir. 1994), cert. granted 115 S.Ct 933 (1995), that employee-members of a union who were sent to apply for work at a nonunion contractor were not employees within the meaning of the Act and therefore could be refused employment.

2. To get union people on the job and create enough trouble by way of strikes, lawsuits, unfair labor practice charges, and general tumult, so that the nonunion contractor walks away from the job.

3. If number 2 does not work, to create enough problems for the Employer by way of unfair labor practice charges, Davis Bacon, OSHA, or legal allegations requiring legal services so that even if the Employer does not walk away from the job, he will be reluctant to bid for similar work in the local area ever again.

I note that Donald Miller gave an interview to the Rochester Business Journal which reported his remarks on July 22, 1994. Miller acknowledged that the quoted remarks were statements he made to the reporter.[3] In pertinent part, the article reads as follows:

> Three men salted the site about 1-1/2 months ago, said Donald Miller, business agent for Local 46. As is the practice in COMET efforts, they agreed to work for wages and benefits that fall substantially below the union rates of $24.42 an hour . . . .
>
> The workers went in ''half under cover,'' saying they were disaffected union members, Miller said.
>
> . . . .
>
> One M. J. Mechanical employee has left the firm to become a union apprentice, and a second is considering a similar move, he said.
>
> Such defections ultimately will bring the company into the union fold, Miller predicted.
>
> ''If they don't have the manpower, they can't do the job,'' he said.
>
> Meanwhile, his first taste of salting has whetted Miller's appetite.
>
> ''This is the way to go,'' he said. ''We plan to do more.''

C. *The Hiring of Paul Colon, Steven Derleth, and Alleged Interrogations During Their Job Interviews*

Paul Colon applied for work at M. J. in early April 1994, with permission from the Union under its salting program. Colon was a union member and had been a journeyman sheetmetal worker since 1988. He states that he was interviewed by Richard Wagner, who among other things, asked if Colon was afraid of being caught by the Union for working at a nonunion contractor. Colon states that he replied that he would cross that bridge when he had to and that this was his own decision to make. Colon testified that Wagner asked him how he felt about the Union and that he told Wagner that he had to feed his family.

With respect to this conversation, it is noted that Colon and Wagner had worked together for a union contractor named Poestler & Joeckle. As Wagner had been a member of Local 46, he presumably was well aware that the Union prohibited its members from working for nonunion contractors and that by accepting a job with M. J., Colon was subjecting himself to union sanctions. Under these particular circumstances, Wagner's inquiries of Colon are understandable and in my view were not, in fact, designed to coerce Colon, but rather to protect him from being fined or otherwise disciplined by the Union. In my view, this type of interrogation is not coercive under Section 8(a)(1) of the Act. *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964); *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985); and *FMC Corp.*, 290 NLRB 483 (1988).

According to Colon, in late April 1994, he had a couple of conversations with Jim Johnson about money and that they ultimately agreed that Colon would go to work on the Bausch & Lomb job at $12 per hour. Colon also states that during one of these conversations Johnson (who had been a member of Local 46 and who has a brother who still is a member), asked if Colon was prepared to leave Local 46 and stay with M. J.

Colon began to work for M. J. on May 2. But before he did, he spoke to Donald Miller who instructed him not to engage in any organizing at the beginning. Miller agreed to pay Colon $300 per week while he worked for M. J. and Colon signed a ''salt agreement.'' This agreement, which is M. J.'s Exhibit 1, required Colon to ''report to the business manager's office for the purpose of assisting as needed in the organizing program,'' to ''maintain his position on the Union's out of work list'' and to ''leave the employer or job immediately upon notification.''

According to Colon, once on the job, he talked to other workers about the Union and told people who asked about the advantages and disadvantages of the Union. He states that the nonunion people were mainly interested in the Union's pay scales and the amount of time union members worked during the year. Neither Colon, Derleth, nor Amico, solicited employees to sign union authorization cards or talked to the nonunion employees about obtaining union recognition from the Employer.

Steven Derleth testified that he contacted Wagner about working for M. J. after being told of the job by union member Amico (who already was on the job as a ''salt''), and after getting permission from Miller to apply for work there under the salting program. Derleth states that after speaking to Wagner on April 24, he met with Wagner, Jim Johnson, and Mark Werner at the construction site on April 25. He states that Johnson (who no doubt was aware that Derleth was a member of Local 46), asked what Derleth's feelings were about the local union. Derleth states that he responded that he was a little unhappy because he had been out of work for a while. In any event, Derleth was hired and began to work on that date. For the same reasons discussed above, I conclude that the Employer did not engage in any illegal interrogation during this interview.

According to Derleth, on April 25, he reported back to Donald Miller that he had been hired and Miller agreed to subsidize Derleth's wages by giving him $300 per week. He too signed the salting agreement described above.

[3] The Respondent subpoenaed a reporter from the Rochester Business Journal and sought to have him produce his notes and materials regarding the preparation of story concerning ''salting'' in the Rochester area. This newspaper story, among other things, quoted Donald Miller in relation to facts that are part of the record in the present case. The newspaper's counsel filed a motion to revoke the subpoena contending that the reporter had a privilege under the First Amendment. I granted that motion and my order was not appealed. Because of the issues raised by the subpoena, I have attached my order as App. A.

D. *The Alleged Refusal to Hire Mark Golding*

Pursuant to the suggestion of Donald Miller, Mark Golding answered an advertisement in the local newspaper for sheetmetal workers by J.D.M. J.D.M., a temporary employment agency, had been retained by M. J. to hire sheetmetal workers for the Bausch & Lomb job.

On April 25 1994, Golding went to J.D.M.'s offices and filled out an application form on which he listed that he had received training from Local 46 and had worked at Crosby-Brownlie, a well-known union contractor in the area. At the office, Golding was interviewed by Christine DeHond who, according to Golding, asked him if he would get in trouble with the Union if he went to work at a nonunion contractor. At the conclusion of the interview, she told Golding that she would contract him at the end of the week.

On or about April 29, Golding received a phone call from DeHond who said that Johnson of M. J. would interview him and that the pay rate would be $12 per hour.

According to Golding, he had an interview with Johnson on May 3, gave his work background, and explained that he was out of Local 46. Golding states that Johnson said that the Company was bidding on a lot of work and trying to expand in Rochester. Golding testified that after some discussion about wages, Johnson asked if he would stay at M. J. if union work picked up. Golding states that at the end of the interview, Johnson said that he would have to check with M. J.'s Buffalo office and would contact him later.

Golding testified that after the interview with Johnson, he went back to the office of J.D.M. and spoke with DeHond who told him that there was a problem because M. J. was worried that if work picked up, he would go back to the Union. Golding testified that she said that M. J. was having a hard time with him as a union member and going back to the Union. Subsequent to this conversation, Golding was not contacted by anyone from J.D.M. or M. J. about the job, albeit Golding was one of a group of union members who later in June, went en masse to the jobsite to make employment applications at M. J. (That will be discussed later.)

Colon, whom Golding described as an interim organizer, testified that in early May 1994, Johnson told him that he had interviewed Golding and had kicked him out of the trailer when Golding, who first asserted that he was out of the Union, later admitted that he was still in the Union.

Johnson testified that after interviewing Golding, he decided not to put him on the job because Golding did not appear to be very knowledgeable about the sheetmetal industry and was ''beating around the bush.''[4] Johnson denied having any conversation with Colon about Golding.

Christine DeHond acknowledged interviewing and sending Golding over to M. J. for a job interview. DeHond denied, however, that she either was told by M. J. or that she, in turn, told Golding that the reason he was not hired was because of his union membership. At the time of the hearing in this matter, DeHond was no longer employed by J.D.M. and had no connection either with that company or with M. J. She was subpoenaed to appear by the Respondent and, as far as I can see, was a disinterested witness in relation to the parties in this case. (I was also favorably impressed with her demeanor.) Moreover, the allegation that the Company refused to hire Golding because of his membership in Local 46 is undermined by the fact that this alleged discrimination occurred within a very short time after the hiring of people like Colon and Derleth who were known to be members of Local 46. (Derleth was hired on April 25 and Colon began work on May 2.)

In my opinion, the evidence is insufficient to establish that Golding was refused employment because of his union membership as alleged by the General Counsel. I also conclude that even if Johnson questioned Golding about whether he would be willing to stay at M. J. if union work picked up, this did not constitute coercive interrogation within the meaning of the Act.

E. *The Alleged Refusal to Hire Don Litolff*

Union member Don Litolff testified that he was directed to the M. J. job by Donald Miller under the salting program and that he was interviewed by Jim Johnson on May 18, 1994. Litolff states that he was initially offered $7 per hour but that Johnson subsequently agreed to pay him $10 per hour. According to Litolff, who had been a member of Local 46 for 6 years and a journeyman for 1 year, he did not list any prior union employers on his job application, apparently in an effort to hide the fact that he was a union member.

Litolff states that on Monday, May 23, 1994, he went to the jobsite with his tools and was prepared to begin work. He testified that at about 6:55 a.m., Johnson called him into the jobsite trailer and after beating around the bush, asked if he was a union member. Litolff states that when he said that he was a member, Johnson said that he could not work unless he got a withdrawal card from the Union. According to Litolff, he refused and Johnson told him to leave. Johnson denied this and testified that Litolff told him that he was turning down the job and going south. This, in turn is denied by Litolff. No one else was present during this transaction.

In relation to the Litolff matter, the Respondent offered into evidence Litolff's job application which lists Ancoma, a union sheetmetal contractor in the Rochester area. This is contrary to Litolff's assertion that he did not list union companies on his application and also indicates that Johnson was aware of Litolff's union affiliation at the time that he offered him a job. It may be that Johnson asked Litolff about obtaining a withdrawal card from the Union, but it frankly makes no sense to assume that Johnson would have conditioned Litolff's employment on withdrawing from the Union. As a member would ordinarily be subject to union discipline for working at a nonunion company, this would have been Litolff's problem and not something that the company needed to be concerned about, assuming that it was willing to hire a man who was a union member.

The General Counsel argues that it is highly improbable that Litolff would have arrived with his tools at the jobsite if he merely had come to decline the job. In ordinary circumstances I would agree. Yet an almost identical situation occurred in *Sullivan Electric*, supra, where under the IBEW's salting program, it was obvious that the purpose of the union in sending members to apply for jobs was not to have them obtain employment, but rather to generate an unfair labor practice case. (Slip op. at 11.) Thus, if this is a tactic used

[4] From my observation I must say that I thought that Golding was very tentative when he gave his testimony. Whether this could be attributed to shyness or to other reasons, his demeanor led me to believe that in a job interview, he could easily have given the impression of ''beating around the bush.''

by a union under its salting program, the improbability that is argued by the General Counsel, becomes a good deal less improbable than what might appear on first blush.

I do not believe Litolff and I do not believe that he was denied employment because of his union membership, a fact that already was known to the Company at the time it offered him the job. The evidence convinces me that Litolff made an application for employment, pursuant to the Union's direction, with the hope and expectation that he would be denied employment which would therefore give the Union grounds for filing an unfair labor practice charge. In my opinion, when that expectation was not met, Litolff decided that he did not want the job and turned it down.

F. *The June 3 Discharges of Derleth and Colon and the Subsequent Offers of Reinstatement*

Colon and Derleth testified that soon after they became employed, they started to talk of the benefits of being in the Union amongst the nonunion employees of M. J. They did not however, solicit or pass out union authorization cards or try to organize these employees in the sense of seeking ultimately to have the Union be their representative in a contractual relationship with M. J. As explained above, the thrust of the Union's activity vis-a-vis the nonunion employees of M. J. was to get them to quit M. J.'s employ and become union members by getting them jobs at other companies having collective-bargaining agreements with Local 46. (This was, in fact, accomplished with respect to M. J. employee Crowel.) Thus, it is my opinion that by late spring 1994, when it became apparent that the Company was not going to grant recognition, the object of the Union was no longer to gain recognition from M. J. but rather to starve M. J. of its permanent work force so that they would not be able to bid for work in the Rochester area.

Colon testified that on May 23, 1994, he was told by Johnson that ''there's a vicious rumor going around that there's people being subsidized by the union for working here.'' Colon states that he answered, ''[N]o'' when Johnson asked if he was one of these people.[5] According to Colon, when he returned to work he spoke about this conversation with Derleth and they both decided to tell Mark Werner that they were in fact being subsidized by the Union. According to Derleth, he told Werner that he was there to organize the employees. According to Colon, Werner asked him if he was a union spy and he replied that he was not.[6] Both Johnson and Werner denied these alleged conversations.

On June 3, 1994, Colon and Derleth were in the company trailer during the coffeebreak when they announced that they were union organizers. When Johnson arrived in the trailer, Colon and Derleth repeated this announcement and Johnson fired them. (Richard Amico, the other salt, did not say anything and was not discharged.) As the motivation for the discharges was because Johnson believed that Colon and Derleth were going to try to organize the employees, the discharges would violate Section 8(a)(3) of the Act unless they should not be construed as employees under the rationale of *Town & Country Electric v. NLRB*, 34 F.3d 625 (8th Cir. 1994), cert. granted 115 S.Ct 933 (1995). However, as I am bound by Board precedent, I shall conclude that the discharges were violative of the Act. In this regard, the Company argues that Colon and Derleth were not engaged in protected concerted activity because they really had no intention of organizing the employees for union representation vis-a-vis their employer. Nevertheless, as of June 3, 1994, the Employer did not know this and Johnson's motivation was based on his belief that they were going to engage in typical union activity.

On Monday morning, June 6, 1994, Colon, Derleth, and Union Business Manager Miller went to the company office in Buffalo where they spoke to Luis DelaFuente and David Nowak who are respectively, the general manager of M. J.'s sheetmetal department, and the Company's estimator. DelaFuente, who had been advised of what happened and had consulted a lawyer over the weekend said that Johnson had overstepped his bounds and he offered Colon and Derleth their jobs back. According to Colon and Derleth, they were advised that they could engage in union organizing activity as long as it was done on their own time and not company time. They assert that they were told that they could not engage in such activity on company time and not during breaks, albeit they could engage in union activity before or after work.

With respect to the above, DelaFuente testified that during this meeting, he said that Johnson had not acted in accord with M. J. policy and that the controller had been instructed to keep Colon and Derleth on the payroll. He states that he told Miller that he would reinstate the two men and that the Company would welcome any other qualified people that the Union could furnish. DelaFuente states that he said that Colon and Derleth would be reinstated unconditionally and that they could do what they wanted at lunchtime, on breaks and after hours, but that they had to work during company time. While Nowak corroborated DelaFuente's testimony in the main (much of which is not in dispute), he was tentative about whether DelaFuente said that the Company was going to allow or prohibit union activity during breaktimes. In this regard, Nowak testified, ''I think he said they could do it on their breaks as well.''

Immediately after the aforementioned meeting, DelaFuente sent a letter to Donald Miller with copies to Colon and Derleth stating:

> Thank you for taking the time to see me at our Buffalo Office this afternoon. As discussed, Mr. Paul Colon and Mr. Steve Derleth have been unconditionally reinstated by our firm.
>
> I will be at the job site at 7 a.m., Tuesday, June 7th to meet Paul and Steve with their paychecks.
>
> I look forward to working with these two men in the future.

Colon and Derleth did not show up at the jobsite on June 7, 1994, and did not communicate further with the Company until their appearance at the site on Monday, June 13. Although the General Counsel suggests that they did not immediately accept the offer of reinstatement because of the alleged prohibition on solicitation during breaktimes, I do not

[5] As noted above, Colon, Derleth, and Amico were being paid $300 per week during their employment at M. J.

[6] In fact, Colon was instructed by Miller to report back to him about conditions at the jobsite. This however, is not such an unusual instruction or activity and I do not think it deserves the opprobrious description of ''spying.''

believe this to be the case[7] and I think that their return to work was orchestrated by the Union with the other events that occurred on June 13 which will be discussed below.

G. *The Allegations Arising out of the Events Occurring on June 13, 1994*

Three events occurred simultaneously on the morning of June 13 and these were, in my opinion, all planned by Miller, Colon, and the other union members who participated in them. Moreover, it is my belief that they were staged with the primary object of provoking the Employer into violating the Act so as to justify the filing of unfair labor practice charges, the establishment of a picket line at the construction site and the assertion that the Union was engaged in an unfair labor practice strike. These events were (a) the return to work of Colon and Derleth; (b) their actions at the site which provoked the receipt of warnings; and (c) the parade of union members into M. J.'s trailer ostensibly to tender applications for employment.

1. The warnings issued to Colon and Derleth

At about 6:30 a.m. on the morning of June 13, 1994, Colon and Derleth met with Donald Miller and eight other union members outside the Bausch & Lomb jobsite where they were given their instructions by Donald Miller. These were Rodd Babicz, Robert Copie, Mark Golding, Dean Weiss, William Roeger, Douglas Stein, John Suhr, and Mark Roberge. In this regard, the other eight members were each given an application form prepared by the Union which they were instructed to tender when they went to M. J.'s trailer office and asked for jobs. In this application, each member wrote down his name, address, telephone number, and his prior experience. At the bottom of the form, it stated:

> NOTE: I am a voluntary Union Organizer. If hired, I will perform all duties to the best of my ability. I will also attempt, during non-work time and in non-work areas, to organize M. J. Mechanical Services, Inc.'s employees into a Union.

Colon and Derleth were the first to enter the trailer and they asked for their jobs back. While there, they witnessed the other eight members enter the trailer, present their job applications, and exit. According to Colon, Johnson told the ''applicants'' that he would let them know about jobs and turning to Colon said, ''[H]ow long are these games going to continue.''

After the men left the office, Johnson told Colon and Derleth to follow Werner to the basement. They did so and assert that while waiting by a toolbox they spoke to other employees about the Union and its apprenticeship program. Colon and Derleth began working in the basement and they testified that while working, they talked to employees Crowell and Werner and encouraged them to contact the Union and discuss job opportunities with union contractors.

Shortly thereafter, Johnson issued warnings to both men which stated: ''Soliciting M. J. Mechanical employees on company time for Local #46. M. J. has no problem with you doing this on your time not M. J. Mechanical's time.''

On receiving the warnings, both Colon and Derleth claimed that this was an unfair labor practice and both left the job. They then proceeded to engage in picketing at the jobsite with signs asserting that the Union was engaged in an unfair labor practice strike against M. J.

The Company presented three witnesses, Jim Johnson, Mark Werner, and John Hill who testified about the events leading up to the warnings issued to Colon and Derleth. Essentially, the testimony of Werner and Hill was that Colon and Derleth left their work areas and went over to speak to other employees where they solicited them on behalf of Local 46 while they were doing their work. According to Hill, Colon told him that he would have better pay and benefits for working for the Union. Werner reported this to Johnson and he in turn decided to issue the warnings described above.

Apart from some minor discrepancies, there is not really that much difference between the versions presented. What is clear from both, is that on June 13, immediately on returning to work, Colon and Derleth, during working time and in work areas, solicited employees on behalf of the Union. Moreover, as conceded by the General Counsel, this solicitation included asking M. J.'s nonunion employees to quit the Company, join the Union, and get jobs at union contractors.

In my opinion, the warnings issued to Colon and Derleth did not constitute violations of the Act for the following reasons.

I have concluded above that DelaFuente on June 6, told Colon and Derleth that they could not solicit during breaktime. To the extent that this amounted to the announcement of or a refinement of its preexisting no-solicitation rule, the rule as announced is too broad and is presumptively unlawful to the extent that it prohibits these employees from engaging in union solicitations during breaks.[8] *Essex International*, 211 NLRB 749 (1974); *Keco Industries*, 306 NLRB 5 (1992); *Ichikoh Mfg.*, 312 NLRB 153 (1993); *BCR Injected Rubber Products*, 311 NLRB 13 (1993); and *McCullough Environmental Services*, 309 NLRB 345, 351 (1992).

Nevertheless, even assuming that the rule was overly broad, this does not mean that employees would be absolutely free to engage in any types of solicitations during worktime and in work areas. In my opinion, the facts show that Colon and Derleth, during their worktime, left their work areas and deliberately walked over to other employees who were working and engaged them in conversations about the Union. Further, the evidence indicates that their solicitations were not designed to result in the Union representing such employees with respect to their employment relationship with M. J., but rather to urge them to quit their employment altogether and obtain jobs elsewhere under the aegis of the

[7] Although it is alleged that Colon and Derleth did not return to work immediately after being offered reinstatement because of the limitation on their right to solicit on breaktimes, neither they nor Miller who was with them, suggested or protested to the Company, at the June 6 meeting or at any time thereafter, that this limitation was improper, illegal, or unfair. While I am inclined to believe that this limitation was expressed by DelaFuente, probably as a result of misunderstanding the legal advice given to him, I doubt that Colon and Derleth decided to remain out of work because of it.

[8] The evidence shows that the Company had a preexisting policy of prohibiting unauthorized solicitations and distributions. However, this policy, which is contained in the Company's personnel manual (G.C Exh. 6), did not specify exactly where or when distributions or solicitations could and could not be made.

Union. The conduct may be concerted but I do not believe it is protected.

In my opinion, these solicitations by Colon and Derleth were was more like a tortious interference with business relations, as they were aimed not at inducing a strike or work stoppage designed to gain improvements in the employees' working conditions vis-a-vis their own Employer, but rather were aimed at permanently severing the relationship of the Company to its employees irrespective of their terms and conditions of employment, in an effort to eliminate M. J.'s ability to employ a viable work force in the Rochester area. Cf. *NLRB v. Electrical Workers IBEW Local 1229 (Jefferson Standard Broadcasting Co.)*, 346 U.S. 464 (1953);[9] *Crystal Linen & Uniform Service*, 274 NLRB 946, 948 (1985);[10] and *Lutheran Social Service of Minnesota*, 250 NLRB 35 (1980).[11]

2. The group job applications and the alleged refusals to hire

As noted above, on the morning of June 13, 1994, a group of union members appeared at M. J.'s trailer, without prior notice, and tendered to Johnson, application forms that had been prepared by the Union and had been filled out at 6:30 a.m. Johnson took the forms and looking at Colon, stated, ''[H]ow long are these games going to continue.'' Although DelaFuente had told Donald Miller on June 6 that the Company would hire applicants sent by the Union, the evidence does not indicate that it had immediate job openings available at the Bausch & Lomb jobsite (or any other site), for all eight of the men who tendered these applications.

Pursuant to instructions from Poole, his secretary, Anne Williams, telephoned all of the ''applicants'' at their listed phone numbers, and left messages either with their answering machines or in one case with a spouse. She testified that one of these people (she could not recall who) called back and he was invited to interview with the Company in Buffalo, New York.

Two of the eight applicants, Mark Roberge and Dean Weiss, told Donald Miller that they had been contacted by the Company to go for interviews. Thereafter, on June 13, 1994, these two men, accompanied by Donald Miller, drove to the Company's main office in Buffalo. As the other six made no effort, either individually or through Donald Miller, to follow up on their job applications, it is clear to me that they abandoned whatever interest they might have had in working for M. J. (Indeed, it seems probable to me that they were never interested in working for this Company in the first place; their tender of applications being more in the nature of a demonstration designed to provoke an unfair labor practice than a good-faith effort to gain employment.)

I do not agree with the General Counsel's allegation that the Company violated the Act by making Roberge and Weiss drive to Buffalo in order to be interviewed. What was involved was a 1-hour drive to the Company's headquarters in order to be interviewed by Poole, the Company's president. I do not think that this was either such an unusual or burdensome condition placed on people looking for jobs.

Dean Weiss was interviewed first. During the interview, Weiss stated that if hired he would be a union organizer. Poole said that he would have no problem with that so long as Weiss did his job and did his organizing before and after work and during lunchtime and breaks.[12]

Roberge was interviewed next and he testified that Poole said that the Company was offering between $8 and $15 per hour but that this did not matter because the Union was going to subsidize Roberge's pay. In his pretrial affidavit, Roberge stated that he responded by saying that the Union might possibly subsidize him for some of the difference but that it would not be enough since ''you guys aren't going to pay me shit.''

Roberge testified that toward the end of his interview, David Valasquez, the Company's sheetmetal shop foreman, came into the room and said that he had been in the Buffalo sheet metal union but had dropped out after he started his own company. He states that Valasquez said that the Buffalo union had tried to fine him and that ''you have to watch out for these union halls, they'll stab you in the back every chance they get.'' This testimony regarding Valasquez was essentially corroborated by the Respondent's witness, David Nowak. Thus, Nowak testified that Valasquez, in addition to asking Roberge if he would be fined if he worked for M. J., also said that Valasquez had gotten into trouble with the Union when he opened his own business and that ''some of these unions will stab you in the back.'' According to the testimony of Roberge and Nowak, Poole asked Roberge if he would leave M. J. if the Union did not succeed in organizing the Company's employees. Roberge replied that Poole should ask Miller that question. (A similar question was asked of Weiss, who states that he said that he did not know and would have to wait.)

The General Counsel alleges that by questioning Roberge and Weiss regarding what they would do if the Union was not successful in organizing the Company's employees, the Respondent unlawfully interrogated them in violation of Section 8(a)(1) of the Act. I disagree. In this circumstance, it was clear to everybody that Roberge and Weiss were going to engage in some type of union activity if they were hired. As such their union affiliation and proposed union activism was overt and therefore they would hardly be intimidated by such interrogation.

[9] In *NLRB v. Electrical Workers IBEW Local 1229 (Jefferson Standard)*, supra, the Court held that employees, who during negotiations, distributed handbills disparaging the quality of the product of their employer were not engaged in protected activity.

[10] In *Crystal Linen*, supra, the administrative law judge concluded that four employees who obtained other permanent employment during a strike were not engaged in protected activity when they solicited their former customers to switch their business from the Respondent to their new employer.

[11] In *Lutheran Social Service of Minnesota*, supra, the administrative law judge opined that in order for employee activity to be concerted and protected it must be related in some way to inducing or preparing for group action for a purpose of remedying, correcting, or improving some grievance or other term or condition of employment. The judge held that mere griping and complaining by employees about management policies or about the competency and good faith of their managers and coworkers, even if arguably concerted in the broadest sense of that term, would not be protected activity within the meaning of Sec. 7 of the Act.

[12] On cross-examination, Weiss conceded that Poole said that he could organize during breaks. Although I concluded previously that Colon and Derleth, on June 6, were told that they could not solicit during breaks, I think that by June 13, the Company had gotten its legal advice straight and made sure that any stated, ''[N]o solicitation'' rule would be in accord with Board law.

Weiss and Roberge were told that they would be contacted but they never were. Poole and Nowak testified that they surmised that neither man was really serious about working for the Company or becoming a long-term loyal employee. They each testified that Weiss seemed to be disinterested during his interview. Nowak testified that Weiss responded to questions by being kind of snappy and that he had a wise guy type of attitude during the interview. Certainly the type of response admittedly made by Roberge during his interview about the Company's wage scale is hardly the kind of remark likely to get anyone hired for any job.

H. *The Refusal to Reinstate Colon*

As previously described, Colon and Derleth each received a written warning on June 13, 1994, and thereupon left the jobsite and participated in picketing that apparently commenced on the following day. In doing so, they announced to the Company that they were striking in protest of the warnings they received on that date and considered their action to be an unfair labor practice strike.

On June 28, 1994, Colon asked Johnson for reinstatement and was refused. Derleth in the meantime had abandoned the strike and had obtained other employment. (Derleth never made an offer to return to work and the General Counsel does not allege that the Company refused to reinstate him.)

Although the Company contends that Colon quit and did not engage in a strike, I do not think that this assertion can stand scrutiny. The Company points out that it filed an unfair labor practice charge against the Union in Case 3–CP–384 which, after investigation, was settled by the Union which agreed, without admitting that it violated the Act, not to engage in picketing which is violative of Section 8(b)(7)(C) of the Act.[13] Assuming arguendo that Colon engaged in picketing which was for a purpose of gaining recognition but was carried out without an election petition being filed within a reasonable period of time, this conclusion would not contradict the assertion that he was engaged in a strike.

Employees who engage in a strike or concerted work stoppage are normally considered to be economic strikers and are, unless they have been permanently replaced, entitled to immediate reinstatement on their unconditional offers to return to work. *Laidlaw Corp*., 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969). In this case, since I have concluded above, that the Company did not violate the Act by the warnings issued to Colon and Derleth on June 13, 1994, and that it did not unlawfully refuse to hire the ''applicants'' who appeared on that same date, the strike in which Colon and Derleth participated, cannot be called an unfair labor practice strike. The real question in my mind is whether the strike, given the objectives of the Union, can be called protected.

The Union's picketing might ultimately have been found to be violative of Section 8(b)(7)(C) of the Act, because an object thereof might have been found to be recognitional. However, such a finding, would not, in my opinion, have made the conduct of Colon unprotected vis-a-vis Section 7 of the Act.

Section 8(b)(7)(C) specifically allows a union to engage in organizational and/or recognitional picketing for a reasonable period of time not to exceed 30 days, without having filed a petition with the NLRB for an election. As such, it is hard for me to conceive of any theory which would on one hand permit such picketing (at least for a reasonable period of time), while also permitting an employer to discharge any of its employees who engaged in such picketing. As Colon's offer to return to work was made within the 30-day period described in Section 8(b)(7)(C), his concerted striking and picketing activity would not be unprotected on account of Section 8(b)(7)(C) of the Act.[14]

Moreover, as the Company is engaged in the construction industry, the Respondent cannot argue that such picketing, if it had been successful in obtaining recognition, would have caused the Company to violate Section 8(a)(2) of the Act by granting recognition to a minority union. This is because under Section 8(f) of the Act unions and employers engaged in the building and construction industry may enter into prehire collective-bargaining agreements even though the Union does not at the time of recognition, represent a majority of the employer's work force in an appropriate unit. *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988).

More troublesome to me is my previous conclusion that once it became clear that the Company was not going to grant recognition, the Union was no longer interested in obtaining recognition from M. J. or in organizing its employees so as to represent them vis-a-vis M. J. as their employer. Having concluded that the Union's principal object, as of the summer of 1994, was to drive M. J. out of the Rochester area by inducing its employees to quit, the question is whether Colon's participation in a strike and picketing for such an object, would be protected under Section 7 of the Act.

There is nothing inherently illegal in a union trying to monopolize the work force and the employers within a particular geographic area in an effort to protect and preserve the wages and terms and conditions of employment that it has been able to negotiate with those employers with whom it has a collective-bargaining relationship. This is particularly true in the construction industry, which in many areas, consists of relatively small companies that bid for work of lim-

[13] Under Sec. 8(b)(7)(C) of the Act, a union commits an unfair labor practice by picketing an employer for a recognitional or organizational object for more than a reasonable period of time, not to exceed 30 days, without filing a petition for an election. This section of the Act also has two provisos which are not relevant here.

[14] A different result would result if the employer had a lawful collective-bargaining agreement with union A, and employees went out on strike and picketed during the life of the contract on behalf of union B which was seeking to gain recognition from the employer. In such a case, the picketing might not only violate Sec. 8(b)(7)(B) of the Act, but also the strike action of the employees might be considered to be in derogation of their lawfully selected collective-bargaining representative. As such, employees engaged in such a strike and picketing might not be engaged in protected activity, albeit their conduct would be concerted. *Teamsters Local 707 (Claremont Polychemical Corp.)*, 196 NLRB 613, 627–629 (1972). Cf. *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975), where the Court held that employees who sought to bypass their union and engaged in a strike in derogation of their collective-bargaining representative were not engaged in protected activity. There might also be a different result if the picketing went on for more than 30 days and Colon's offer to return to work did not occur until after the 30th day. See *Rapid Armored Truck Corp*., 281 NLRB 371 at fn. 1 and 391–382 (1986).

ited duration and who perform services at different locations, often employing a somewhat transient work force on a project by project basis. That a union may try and succeed, for example by picketing, in either requiring nonunion employers to meet prevailing wage and benefit standards which are roughly equivalent to those of union contractors, or in preventing outside nonunion contractors from successfully obtaining work in the Union's jurisdiction (and thereby undermining its ''area standards''), is not inappropriate under the law. Cf. *Giant Food*, 166 NLRB 818, 823 (1967).[15]

Moreover, in the construction industry, an agreement between a union and an employer prohibiting subcontracting of jobsite work to nonunion employers is lawful under the terms of the construction industry proviso to Section 8(e) of the Act and is therefore not a violation of the antitrust laws. *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616 (1975). What is prohibited under the antitrust statutes are those situations where a group of employers together with a union, conspire and act, on behalf of the companies, to prevent other employers from gaining access to a market. *Allen Bradley Co. v. Electrical Workers*, 325 U.S. 797 (1945). Also prohibited would be an agreement between a union and a group of employers to prohibit subcontracting to nonunion contractors, if such an agreement was ''outside the context of a collective-bargaining relationship and not restricted to a particular jobsite.'' *Connell Construction Co. v. Plumbers Local 100*, supra at 635.

I shall assume that a union, without seeking to gain recognition as a collective-bargaining representative, nevertheless could have a legitimate interest in trying to maintain a local monopoly by forcing or attempting to force a nonunion employer out from the area of its jurisdiction, and that it may take actions such as strikes and picketing (or entering into agreements protected by Sec. 8(e) of the Act), which are immune from legal assault either under the NLRA or the antitrust statutes. This does not mean, however, that a company faced with such an assault, has no equivalent interest in self-preservation and cannot take appropriate actions to protect its business. Thus, while I see nothing illegal in a union engaging in a primary strike to force a company to cease doing business in a local area, I do not see that a company is required to subsidize such an effort by employing or reemploying an employee, who in concert with the Union, engages in a strike, not for the purpose of gaining better wages and benefits for himself and other employees vis-a-vis this employer, but rather to protect the wages and benefits of fellow union members employed elsewhere. In balancing the respective interests, I shall conclude that such activity by Colon, although not prohibited by the Act, is not protected by the Act.

[15] In *Giant Food*, supra, the administrative law judge stated, inter alia:

> Implicit . . . is the proposition that whatever long-range objective a union may have regarding organization and bargaining for employees in a given industry, it may at any given time decide to forego its long-range objective and limit the thrust of its immediate activity to preserving what it already has. Where a union has in some measure organized an industry and negotiated collective-bargaining contracts for the organized employees, it presumably has achieved standards of employment for those covered employees which it wishes to protect. A competing employer who is not organized, and who pays its employees on a lesser scale will normally have lesser costs, and may thus be able to lower its prices to an extent that may enable it to gain a greater share of the market. This may place an organized employer who is unable to make similar price cuts and still meet the cost of his union contract at a competitive disadvantage. Such employer may be driven out of business all together, or at the very least may be forced to press the union to lower the negotiated standards to that it may remain in business. A union has an obvious interest in forestalling this sort of thin, and the area standards doctrine permits it lawfully to picket in pursuit of an object of this nature even though in so doing it specifically undertakes to increase the unorganized employer's cost.

I. *Christopher Diak*

On or about July 13, 1994, Paul Colon and Donald Miller showed Christopher Diak a newspaper advertisement which indicated that the Company through J.D.M., an employment agency, was looking to hire sheetmetal workers. Diak agreed to apply for the job and agreed to abide by the Union's ''salting resolution.'' He was promised a subsidy of $300 per week by the Union, if he obtained employment at the Bausch & Lomb jobsite.

Diak applied for the job by filling out an application at J.D.M. where he listed some nonexistent companies for his prior work experience. This was done because he and the Union, believed that if it was known that he worked for union contractors and was a union member, he would not be hired. J.D.M., not knowing that Diak was a member of Local 46 sent his application to M. J. and arranged for an interview to be held on July 19, 1994.

On July 19, 1994, Diak was interviewed by Johnson who asked him, among other things, if Diak had anything to do with the Union. Diak said no. Johnson told Diak that the Company was trying to come into the Rochester area; that he had been a member of Local 46; and that the Union had driven his brother out of business. He also told Diak that the Union was after the Company and that they did not want us here. Diak testified that Johnson asked him about his past experience and the companies that were listed on his application. At the conclusion of the interview, Diak was told that Johnson's superior, Luis DelaFuente, would interview him on Friday.

On July 22, 1994, Diak was interviewed by DelaFuente, who among other things, asked if he was a member of Local 46. He states that DelaFuente said that the Company was trying to expand into the Rochester area and hoped to be able to use the people it hired for the Bausch & Lomb job as foremen on other Rochester jobs. At the conclusion of the interview, Diak was told that he was hired subject to a physical and a drug test. (At this point, in light of the events previously described, I have little doubt that had Diak admitted that he was a member of Local 46, he would not have been hired.)

On July 29, Diak was told to report to work on Monday, August 1, 1994.

When Diak began work, the Union was engaged in picketing the jobsite. In this regard, since a separate gate had been established for M. J., the Union was therefore confined to picketing at that entrance. Diak states that on the morning of August 1, 1994, Mark Werner pointed to Paul Colon who was on the picket line and called him a ''trouble maker'' and a ''low life spic.'' He also states that Werner said that he hated the Union because it was requiring him to pay back

money he had received to go to the Union's apprenticeship school. Although conceding that the Union was seeking to force him to pay back money, Werner credibly denied making the remarks attributed to him by Diak and specifically denied the remarks about Paul Colon.

An interesting event occurred on Wednesday, August 3, which allegedly gave rise to some 8(a)(1) statements by Johnson. As noted above, a separate gate was established for the exclusive use of M. J. and its suppliers. One of M. J.'s suppliers was a company called Crosby-Brownlie whose employees, including its truckdrivers, were represented by Local 46. On this occasion, Crosby-Brownlie was scheduled to deliver a load of sheetmetal to M. J. at the site and instead of going to the gate reserved for M. J., its truckdriver went to another gate. On arrival at the wrong gate, the driver was seen talking to Donald Miller and Paul Colon was seen taking photographs of the truck and the gate. When this occurred, Johnson became irate and directed the crew to reload the truck and take it to the correct gate. Diak testified that Johnson said that he would ''fix those union assholes'' and that he would call up his brother at Crosby-Brownlie and cancel M. J.'s existing orders. Diak also testified that soon after the incident, Johnson, after getting off the phone, said that ''we'd rather close up shop than sign a contract with the union.'' In this latter respect, Johnson credibly denied making such a statement, and Diak's initial testimony was that Johnson said that they would rather close up shop than sign with a union contractor.

With respect to this incident, Diak testified that the truckdriver went to the wrong gate pursuant to the directions of Jim Johnson. This was denied by Johnson, from whose testimony, and the testimony of Werner, one can draw the inference that the driver went to the wrong gate at the direction of Miller. I do not credit Diak, and I cannot imagine that Johnson, who seemed to be at least of average intelligence, would have been so stupid as to jeopardize the viability of the reserved gates by directing the driver to the wrong gate and thereby permitting the Union to picket at all of the entrances to the jobsite.

The General Counsel contends that Johnson's statements amounted to an illegal threat of reprisal. But the question is reprisal to whom. Assuming that he made a statement to the effect that he would cancel a contract with the supplier and not sign contracts with any other suppliers having agreements with Local 46, it certainly was not a threat of reprisal directed to any of the employees of M. J. At most, it was a threat to cancel a contract that M. J. had made with a unionized firm whose truckdriver seems to have disregarded instructions to deliver sheetmetal to the correct gate at the jobsite. In this context, I do not believe that the statements were illegal given the context in which they occurred. Thus, it seems to me that what the Union was doing in this instance, was attempting, with the connivance of its truckdriver member, to establish that M. J. was not complying with the reserve gate so that the Union would be free to picket all of the gates and not be limited to the single gate reserved for the exclusive use of M. J. and its suppliers.[16]

On the morning of Thursday, August 4, 1994, Diak was told by Mark Werner that the general contractor had reported that Diak had been seen walking around the jobsite without having his field glasses and hardhat on. Diak responded that he had taken his glasses and hardhat off for less than a minute to wipe off some sweat and asked for the name of the person who reported him. Diak was given a warning which stated: ''Hard hats and Glasses must be worn at all times.''

Also on August 4, Diak was assigned to put in some duct work. In this regard, Werner testified that on this occasion, Diak installed what is called a sweet tap backwards which meant that if there was a fire, the fire damper would not have been able to stop the fire from spreading. Diak admits that he made this mistake and sought to minimize it. He conceded, however, that a journeyman mechanic should know that you cannot properly install a sweet tap without first looking at the blueprints so as to determine which direction it must go. Nevertheless, Diak concedes that he did so without looking at the blueprint, which means, by his own testimony, that he had a 50-percent chance of getting it wrong.[17]

Later in the morning of August 4, Diak managed to hit himself on his thumb with a hammer and the Company sent him to the local hospital. Diak states that he returned to the jobsite at about 9:40 a.m. and that he was moved from the third floor to the first floor.

Before going to the hospital, Diak spoke to Luis DelaFuente who asked him if had ever worked for a company that was a union contractor in Syracuse and also asked what type of work he had done at Jaspar, one of the companies that Diak had listed on his application form.

According to Diak, at about 5 p.m., he spoke with Colon near the site and Colon suggested that he disclose to the Company that he was a Local 46 member. Diak agreed that he would do so on Friday, August 5, which was not a scheduled workday.

Diak testified that on August 5, 1995, he showed up at M. J.'s trailer, announced to Johnson that he was an organizer for Local 46, and asked if Johnson had any problem with that. Diak testified that Johnson said no, whereupon he joined the picket line outside of M. J.'s gate. According to Diak, at about 2:45 p.m., he received a phone call from Eileen Barry from J.D.M. who told him that his job at M. J. was over. He was given no reason.

On Monday, August 8, Diak went to M. J.'s trailer and was unsuccessful in getting his job back.

Luis DelaFuente testified that on or about August 2, 1994, Johnson called him and said that he believed that Diak was another salt from Local 46. He states that when he told Johnson that he was mistaken, Johnson replied that he found out that Diak had recently been employed by a union contractor, that he was an active member, and that Jaspar Mechanical did not exist. DelaFuente testified that as a result of this conversation, he had his secretary check out Diak's references

[16] For a discussion of the law dealing with secondary boycotts and reserve gate picketing in the construction industry see *Building Trades Council of New Orleans (Markwell & Hartz)*, 155 NLRB 319 (1965), enfd. 387 F.2d 79 (5th Cir. 1967), cert. denied 391 U.S. 914 (1968). In cases where a primary employer fails to observe a reserved gate, a union will not be limited to picketing at such an entrance. See *Operating Engineers Local 450 (Linbeck Construction)*, 219 NLRB 997 (1975), affd. 550 F.2d 311 (5th Cir. 1977); and *Teamsters Local 295 (Montgomery Ward)*, 194 NLRB 1144 (1972).

[17] In light of this testimony, one wonders whether Diak was either an incompetent mechanic or was deliberately engaged in sabotage.

and she discovered that companies listed on his application did not exist.

According to Luis DelaFuente, at some point on August 4, 1994, he received another call from Johnson who mentioned the hardhat incident and also said that Diak was walking around the job soliciting the other employees. He states that a little later, Johnson called back to say that Diak had injured his thumb. (Johnson testified that at this point, he recommended to DelaFuente that Diak be discharged.) DelaFuente testified that when he spoke to Diak he told him that he was concerned about the hardhat issue because M. J. wanted to make a good impression with the general contractor and did not want any insurance or OSHA problems. DelaFuente states that when Diak said it would not happen again, he asked Diak if he was sure about the information Diak gave on his job application and if he was affiliated with Local 46.

DelaFuente testified that he decided to discharge Diak because he had given false information on his job application and because he believed Diak was a ''salt'' who was engaged in the same type of activity as Colon. He testified that he knew ''we were being set up for ulps.''

The General Counsel contends that the Company violated Section 8(a)(3) of the Act by issuing the warning to Diak on August 4; by moving him from the third floor to the first floor on that date; and by discharging him on August 5. He argues that all three actions were motivated by Diak's organizational activity on behalf of Local 46.

Insofar as the discharge is concerned, DelaFuente essentially concedes that a reason for Diak's firing was because he discovered that Diak was a ''salt'' and that Diak was engaged in the same type of union activity as Colon. (In my opinion, the August 4 warning was clearly warranted based on safety considerations. It is also my opinion that the General Counsel has not established that the 1-day transfer of Diak from one floor to another was either an adverse action or motivated by union considerations.)

In my opinion, the Company was correct in believing that Diak's union activity was the same as that engaged in by Colon. That is, like Colon, Diak was being paid $300 per week by the Union to work for M. J. and since he was working at the direction and under the control of Miller, I must assume that his activity consisted of trying to get the nonunion employees of M. J. to quit their employment and get jobs with companies having contracts with Local 46. Accordingly, for the same reasons cited above in relation to the refusal of the Company to reemploy Colon, I shall conclude that Diak, although engaged in union activity, was not engaged in activity which was protected by Section 7 of the Act. Therefore, I shall recommend that this allegation be dismissed.

Similarly, I shall also recommend that the interrogation allegation be dismissed, although the evidence establishes that Diak was asked by both Johnson and DelaFuente about his union affiliation. In this connection, I make this recommendation because, in these peculiar circumstances, I think that the Company had a legitimate business justification in making the inquiry and that this outweighed the rather dubious conclusion that this interrogation would have intimidated Diak. At the time that Diak was asked these questions, both at his interview and after being on the job, the Union was seeking to induce the Company's work force to quit through the solicitations by its ''salts.'' As I have concluded above that this type of union activity was not protected by the Act, I also conclude that it was not impermissible for the Company to ask questions of job applicants to determine if they were going to be engaged in this same type of salting activity.

CONCLUSIONS OF LAW

1. By discharging Paul Colon and Steven Derleth on June 3, 1994, the Respondent violated Section 8(a)(3) and (1) of the Act.

2. By telling Colon and Derleth on June 6, 1993, that they could not solicit during their break periods, the Respondent violated Section 8(a)(1) of the Act.[18]

3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7)

4. The Respondent has not violated the Act in any other manner as alleged in the consolidated complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees, it must make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

As the Company made an offer of reinstatement on June 6, 1994, which offer was accepted by Paul Colon and Steven Derleth on June 13, it need not make a new reinstatement offer to these two people. Moreover, the backpay period cannot exceed the date of their return which was June 13, 1994.

Although the Company would assert that the backpay period should be cut off as of the date of the reinstatement offer, I think that the General Counsel is correct in his argument that the June 6 offer was tainted by the concurrent statements by DelaFuente to these two individuals that they would not be allowed to solicit other employees during their breaktimes. Therefore, as it is reasonable to conclude that the offer of reinstatement was, at least to a degree, conditioned on Colon and Derleth agreeing to abide by an invalid no-solicitation rule on their reemployment, I conclude that their initial refusal to accept the offer would not cut off their

[18] The Respondent, citing *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), argues that even if it violated the Act in this respect, it repudiated that action. I don't agree. As noted in *Passavant*, a respondent may ''under certain circumstances relieve himself of liability for unlawful conduct by repudiating the conduct.'' The Board noted that in order to be effective, the repudiation must be ''timely,'' ''unambiguous,'' ''specific in nature to the proscribed illegal conduct,'' ''free from other proscribed illegal conduct,'' that ''there must be adequate publication of the repudiation to the employees involved and there must be no proscribed conduct on the employer's part after the publication.'' Additionally, the Board stated that ''finally . . . such repudiation or disavowal of coercive conduct should give assurances to employees that in the future their employer will not interfere with the exercise of their Section 7 rights.''

backpay as of June 6, notwithstanding their subjective intent. *Consolidated Freightways*, 290 NLRB 771, 772 (1988).

[Recommended Order omitted from publication.]

APPENDIX A

ORDER QUASHING SUBPOENA

Prior to the commencement of the hearing in these cases, the Respondent, M. J. Mechanical Services Inc., issued, on February 2, 1995, a subpoena duces tecum to Will Astor, a reporter for the Rochester Business Journal, Inc. This called for him to appear and testify at the hearing and to produce:

> Any and all notes, records, or recordings, including tape or other electronic recording, which you made in preparation to write an article about M. J. Mechanical Services, Inc. and Sheet Metal workers Local Union No. 46. The article was published on July 22, 1994 and captioned ''Union Organizer Salting Spreads at Work Sites.''

On March 2, 1995, Terrance P. O'Grady filed a petition to revoke the above subpoena, claiming a ''reporter's privilege'' under the First Amendment to the United States Constitution. The petition to revoke was filed more than 5 days after service of the subpoena and therefore would ordinarily be construed as being untimely filed under Section 102.31(b) of the Board's Rules and Regulations. *Valley Camp Coal Co.*, 265 NLRB 1683 (1982).[1] Astor's counsel argues that because of the substantial public policy issues involved, the time limits set forth in the Board's Rules should not preclude consideration of the matter on the merits.[2]

While it is true that a petition to quash must be timely filed, the Board has made some exceptions where important public policy considerations are at issue. For example, in *New Britain Machine Co.*, 105 NLRB 646 (1953), a subpoena to a state conciliator was quashed even though the motion was untimely filed. In *Cashman Auto*, 109 NLRB 720 (1954), enfd. 223 F.2d 832 (1st. Cir. 1955), a subpoena seeking the production of records from the Massachusetts Division of Employment Security was quashed despite the fact that no timely petition to quash had been filed. See also *Tomlison*, 74 NLRB 681, 683 (1947), and *International Furniture Co.*, 106 NLRB 127 (1953) (testimony sought from Federal conciliators). As it is my opinion that the public policy question is substantial, I do not believe that the timeliness issue should be dispositive and I shall therefore consider the matter on its merits.

On March 7, 1995 (1 day after the hearing opened), Thomas S. Gill, on behalf of M. J. Mechanical Services Inc. (M. J.), filed an opposition to the motion to quash. Perhaps recognizing that his subpoena was overly broad, Gill indicated that he would only seek to compel evidence regarding statements made to the reporter by Paul J. Colon, Steven Derleth, and Donald Miller, the latter being the business manager of Local 46, and the former being members of Local 46 who are alleged in the complaint to have been discriminated against by M. J. in violation of Section 8(a)(1) and (3) of the NLRA. Gill points out that requiring the reporter to disclose statements made by these individuals—(he does not know if Derleth made any statements)—would not require the disclosure of confidential sources, as Colon and Miller were quoted by name in the article. (Assuming arguendo that Derleth spoke to the reporter, it is highly unlikely that he would be construed as a confidential source.)

The consolidated complaint alleges, inter alia, that M. J. discriminated against Paul Colon and Steven Derleth and that it also refused to hire a group of other Local 46 members because of their union membership and because of their expressed intention to organize M. J.'s employees. M. J. contends that the Union planted Colon and Derleth under its ''salting program'' and that their primary purpose was not to perform work for M. J. but rather to cause, by ''hook or by crook,'' M. J., a nonunion contractor, to be thrown off the jobsite where they were working. M. J. contends that the other union members whom it refused to hire, were not serious applicants for work and that they too were ''salts.'' M. J. contends, among other things, that pursuant to the decision in *Town & Country Electric v. NLRB*, 34 F.3d 625 (8th Cir. 1994), cert. granted 115 S.Ct 933 (1995), all of these individuals were not employers within the meaning of the Act.

The newspaper article is a description of the efforts of various unions, including Local 46, to deal with nonunion contractors working in the Rochester area. It describes the dispute between Local 46 and M. J. at the Bausch & Lomb construction site. The article goes on to describe the various unfair labor practices filed by the Union and includes remarks made by Colon, Miller, and company officials setting forth their respective views of the matter. The statements attributed to either side are, in my opinion, not particularly controversial and each person quoted has testified and confirmed almost all of the remarks attributed to him by the reporter. As far as I can see, there are no statements in the article, attributed to either Colon or Miller which, if not already admitted, would add anything to M. J.'s defense in this case. In essence, therefore, Gill is hoping to ascertain some other unknown statements made by Local 46 members and representatives, which although not reported by Astor in his article, would be damaging to the Union's case. This can be described as a ''fishing expedition.''

In *Branzburg v. Hayes*, 408 U.S. 665 (1972), the Supreme Court, by a five-judge majority, held that a newspaper reporter could not rely on the First Amendment to refuse to testify before a grand jury regarding evidence of a crime that he had personally observed and written about. In a concurring opinion, Justice Powell indicated that the Court, while rejecting the privilege in the case at hand, did not preclude ''newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources.'' Justice Powell noted that the Court's majority had stated that harassment of newsmen would not be tolerated and he went on to state that ''if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without

[1] Under the Board's Rules, if the subpoena is served by mail, an additional 3 days is allowed to file a petition to quash.

[2] I note that the subpoena, itself, does not give notice that a petition to quash must be filed within 5 days of service. Where as here, the subpoena is served on a nonparty witness, there is no reason to assume that the person would be aware of the Board's Rules and Regulations.

a legitimate need of law enforcement he will have access to the court on a motion to quash and an appropriate protective order may be entered.''

A number of Federal courts and the Board have been faced with this type of issue after the Supreme Court's decision in *Branzburg v. Hayes*, supra. In all instances, the Courts have construed *Branzburg* as giving a qualified privilege to newsmen and news gathering organizations; have applied that privilege in civil and criminal cases; and have, at least in some instances, extended this limited privilege to cases not involving confidential sources.

In *NLRB v. Mortensen*, 701 F.Supp. 245 (D.C. Cir. 1988), the court enforced a subpoena issued by the General Counsel of the Board which required a newspaper reporter (Mortensen) to testify in an unfair labor practice trial. The court, while construing *Branzburg* as giving a degree of First Amendment protection to news gathering, cited *United States v. Criden*, 633 F.2d 346 (3d Cir. 1980), cert. denied 449 U.S. 1113 (1991), as establishing the following three-part balancing test.

> First, the movant [seeking to override the privilege] must demonstrate that he has made an effort to obtain the information from other sources. Second, he must demonstrate that the only access to the information sought is through the journalist and her source. Finally, the movant must persuade the court that the information sought is crucial to the claim.[3]

In enforcing the subpoena, the court in *NLRB v. Mortensen*, supra, noted that during the hearing, Respondent's agents had denied statements attributed to them by the reporter, that these statements were not attributed to confidential sources; that they were critical to the General Counsel's theory of violation; and that the reporter was merely being asked to confirm that the statements were in fact made. The court noted that, ''[a]pplying the guidelines to the facts of this case, the court is convinced that the reporters' qualified privilege must yield to the NLRB's need to verify the statements.'' The court also noted that the NLRB had ''fulfilled its obligation to exhaust possible alternative sources of information.'' See also *Valley Camp Coal Co*., 265 NLRB 1683 (1982), where the Board refused to quash a subpoena served on a newspaper's business editor, where the General Counsel sought to have him verify that certain relevant statements made by the Respondent were accurately reported in the newspaper.[4]

In *United States v. Burke*, 700 F.2d 71 (2d Cir. 1983), the court held that a reporter had a qualified privilege in both civil and criminal cases, stating that there are ''important social interests in the free flow of information'' protected by the reporter's qualified privilege and that ''reporters are to be encouraged to investigate and expose, free from unnecessary government intrusion, evidence of criminal wrong-doing.'' In that case, the court quashed a subpoena directed to Sports Illustrated relative to notes taken in conjunction with an interview with one Henry Hill who was a principal witness in a point shaving scheme. The court noted that the defense had produced a wealth of impeachment evidence against Hill and that any information that might be gleaned from the magazine's work papers would merely be cumulative and would not defeat the privilege.

In *U.S. ex Rel. Vuitton et F Fils S. A. v. Karen Bags, Inc*., 600 F.Supp. 667 (1985), an indigent defendant sought to have a subpoena issued to CBS for the out takes from ''60 Minutes'' in an attempt to show that he was entrapped by the Government into committing the alleged crime. The court refused to authorize the subpoena, holding that the defendant's belief that the out takes would furnish relevant information was ''pure conjecture'' and was a ''fishing expedition.'' As such, the court concluded that the reporter's qualified privilege was not overcome by the defendant's desire to subpoena confidential unpublished material. See also *Silkwood v. Kert McGee Corp*., 563 F.2d 433, 438 (10th Cir. 1977), where the court held that a freelance reporter making a documentary film (who was a nonparty witness), could claim the reporter's qualified privilege as to questions about his sources. The court noted, among other things, that ''it has been concluded that compulsory disclosure in the course of a 'fishing expedition' is ruled out in the First Amendment case.''

In *U.S. v. Cutler*, 6 F.3d 67 (2d Cir. 1993), Cutler, an attorney for Hohn Gotti, was charged with criminal contempt for allegedly violating a district court's order prohibiting public comment during the criminal trial of his client. In relation to his own trial, Cutler subpoenaed newspaper reporters and television stations who moved to quash the subpoenas. In splitting the baby, the court held that reporters' notes and television out takes were Cutler was the interviewee were obtainable by subpoena, since the interviews with Cutler and the out takes of such interviews were precisely the type of evidence disclosable in *Branzburg*, supra. However, the court also held that unpublished reporter notes of interviews with government officials were not disclosable and the subpoenas to that extent were quashed.

In the present case, I suppose that the subpoena to Astor, insofar as it seeks to disclose alleged prior statements made to him by Local 46 officers and members in the course of the Union's dispute with M. J., would meet a definition of relevancy, broadly cosntrued. On the other hand, the remarks attributed to the persons in the newspaper account, have either been substantially admitted by Miller and Colon in their testimony or are not particularly relevant to this proceeding. Indeed, it seems to me that what Gill is seeking is not confirmation of the reported statements, but rather an opportunity to ask if there were any other unpublished statements which might somehow or other help in defense of his client. To my mind, this is a fishing expedition. As it has not been demonstrated to me that there is likely to be information obtainable through this subpoena that would be important to the outcome of this case, I conclude that the need for the subpoena has not overcome the qualified reporter's privilege.

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[3] It is noted that the Court in *United States v. Criden*, supra, concluded that a qualified privilege exists even where the party issuing the subpoena was not seeking to compel the disclosure of confidential sources. In this regard, the Court stated:

> We need not develop a precise test for the peculiar circumstances presented here, although we will venture the view that the defendants probably should be required to prove less to obtain the reporter's version of a conversation already voluntarily disclosed by the self-confessed source than to obtain the identity of the source itself.

[4] In *Valley Camp Coal*, supra, the petition to quash was not timely filed. Nevertheless, the Board decided the issue on the merits rather than relying on its 5-day rule.